IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 687.

LOUIS H. FAHEY and A. A. AMMANN, Individually, and Respectively as Federal Home Loan Bank Commissioner, and Conservator for the Long Beach Federal Savings and Loan Association,

Appellants,

vs.

PAUL MALLONEE, C. H. NEWHOUSE, WINNIE BUCKLIN, LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, *et al.*,

Appellees.

On Appeal From the District Court of the United States for the Southern District of California.

Brief for Appellee Long Beach Federal Savings and Loan Association Defendant and Cross-Claimant Against Appellants Fahey and Ammann, and also Third Party Plaintiff vs. Federal Home Loan Banks of San Francisco, Los Angeles and Portland, Defendants Below.

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Appellees.

Brief for Appellee Long Beach Federal Savings and Loan Association Defendant and Cross-Claimant Against Appellants Fahey and Ammann, and also Third Party Plaintiff vs. Federal Home Loan Banks of San Francisco, Los Angeles and Portland, Defendants Below.

Opinion Below.

The opinion of the District Court of the United States for the Southern District of California [R. 374-378] was reproduced in full in the Brief for Appellees Shareholder Members Protective Committee, Mallonee, Newhouse and Bucklin, and is also reported in 58 Fed. Supp. 418.

Questions Presented.

1. Whether a completely solvent Federal Savings and Loan Association, with surplus in excess of $1,300,000 and which has grown in 12 years from $7500 to $26,000,000 exists only at the pleasure and whim of the Federal Home Loan Bank Commissioner.

2. Whether without express authority from Congress so to do, the Federal Home Loan Bank Commissioner can set up his own administrative procedure, wherein he makes his own laws of pleading, evidence, procedure, and judgment and thereby oust the United States Courts of the jurisdiction given them by the Constitution and the Congress of the United States.

3. Whether the only hearing ever accorded such solvent seized Federal Savings and Loan Association is to be decided by the Federal Home Loan Bank Commissioner, who has publicly announced, prior to such hearnig, that he has decided the case against the said association and in favor of himself.

4. Whether said Federal Home Loan Bank Commissioner, without notice or hearing and without the consent of any of the shareholders, members or depositors whose savings and homes are involved, can merge Federal Savings and Loan Associations into other institutions, thus changing the obligations and benefits of such depositors and home owners without their knowledge or consent

5. Whether a United States District Court within whose jurisdiction are situated the 8000 homes, title to which is involved and within whose jurisdiction are physically located the $26,000,000 in assets and securities has jurisdiction under Title 28, Section 118 and Section 41, Subdivision 26, U. S. C., to decide the constitutionality

of the Acts of Congress under which appellants claim to have seized possession of, and title to, said assets and securities, and entangled the title to said homes.

6. Whether upon determination of the question of constitutionality adversely to defendants (appellants), the District Court may order the property seized by them under the unconstitutional statutes restored to those from whom the defendants confiscated it or must leave the trespassers under the unconstitutional statute in possession until final determination of every ultimate detail of the litigation.

7. Whether Section 5(d) of the HOLC Act of 1933 is unconstitutional

A. Because it denies due process of law,

B. Because it improperly delegates legislative power, and is, therefore, unconstitutional on one or both of grounds A and B.

Statement.

This action arises from the seizure by appellants Fahey and Ammann of two completely solvent and liquid financial institutions.

First. The Federal Home Loan Bank of Los Angeles with assets of $43,000,000 and a surplus of $1,900,000 was seized, liquidated and merged all in one day on the 29th day of March, 1946. [R. 293-295.]

Second. Long Beach Federal Savings and Loan Association with assets of $26,000,000 and a surplus of $1,300,000 which was seized on May 20, 1946. [R. 5.] Its similar liquidation and merger were prevented by a restraining order issued on application of plaintiffs by the United States District Court in this action. [R. 27.]

Both seizures were made without notice, without hearing and without cause. [R. 1-17.]

Both seizures are inter-related. Seizure of the Long Beach Federal being caused by resistance made to the seizure and dissolution of the Los Angeles Bank. [R. 7-9.]

The Long Beach Federal Savings and Loan Association was organized in 1934 with an initial capital of $7500. Its officers and board of directors were practically identical from the time of its organization to the time of its seizure by defendants Fahey and Ammann on May 20, 1946. [R. 207, 477.]

In 12 years it has grown from an initial capital of $7500 to in excess of $26,000,000. [R. 477.] In the last month before its seizure it had increased in shareholder member deposits approximately $537,956.15. [P. 5 Supp. Aff. MacArthur Supreme Ct.] From the date of its organization to the date of its seizure it had uniformly and consistently paid dividends every year of from 2½ to 4% per annum. [R. 284.] Its solvency had never at any time been in question and at the time of its seizure it had a surplus of approximately $1,300,000. [R. 285.]

It, like all other Federal Savings and Loan Associations, was required by law to be a member of a Federal Home Loan Bank. When it ceased to have such membership, it also ceased to exist as a Federal Savings and Loan Association. [R. 104.] The Long Beach Federal Savings and Loan Association during March of 1946 owned approximately 3400 shares of stock in the Federal Home Loan Bank of Los Angeles which stock had a value of approximately $340,000 to $360,000.

T. A. Gregory, who had been President of the Long Beach Federal Savings and Loan Association since its organization in 1934, was one of the directors of the Federal Home Loan Bank of Los Angeles. The Federal Home Loan Bank of Los Angeles had about $43,000,000 in assets and was also unquestionably solvent and had a surplus of about $1,900,000. [R. 361.] M. M. Hurford had been President of the Federal Home Loan Bank of Los Angeles for ten years and Charles E. Berry had been Vice-President of said bank for 8½ years (since 6/15/37). On November 23, 1944, President Hurford died. [R. 355.] Vice-President Berry was elected as President of the Federal Home Loan Bank of Los Angeles on two different occasions by the board of directors of the said bank. [R. 356.] James Twohy, Deputy Governor of the Federal Home Loan Bank System under Defendant Fahey, was ambitious to become President of the Los Angeles Bank. [P. 5, Spec. Cong. Comm. Rep. Ex. "D" Mallonee Aff. Supreme Ct.] Defendant Fahey, as Federal Home Loan Bank Commissioner, refused to confirm Mr. Berry's elections, and an acrimonious controversy arose between Fahey and the Board of Directors of the Los Angeles Bank as to who should be the President of the bank. T. A. Gregory, President of the Long Beach Federal Savings and Loan Association and a director of the Federal Home Loan Bank of Los Angeles, took a prominent part in this controversy. [Pp. 1-3, Spec. Cong. Comm. Rep. Ex. "D" Mallonee Aff. Supreme Ct.] On March 29, 1946, without notice, without hearing, without cause the $43,000,000 solvent, Federal Home Loan Bank of Los Angeles, with a surplus of approximately $1,941,330.49 was instantaneously merged, liquidated and dis-

solved by defendant Fahey through Federal Home Loan Bank Administration Orders No. 5084 and 5082. [R. 349-352.] By these orders the Los Angeles Bank was merged into the Federal Home Loan Bank of Portland and the new institution resulting from said mergers was called the Federal Home Loan Bank of San Francisco.

By this purported merger and liquidation, the stockholders in the Los Angeles Bank became involuntary stockholders in a new institution with unknown assets, unknown liabilities and a totally strange set of officers and directors; said new institution being located at San Francisco, California, some 500 miles from Los Angeles. The stockholders of the merged, liquidated and dissolved Los Angeles Bank formed a committee, solicited funds, and were about to file action in court to question the instantaneous, summary liquidation, merger and dissolution, of the Los Angeles Bank. [P. 3, Spec. Cong. Comm. Rep. Ex. "D" Mallonee Aff. Supreme Ct.] The Congress of the United States became interested in this treatment of the Los Angeles Bank and scheduled a hearing before the Special Committee of the House of Representatives to Investigate Acts of Executive Agencies Beyond the Scope of Their Authority. [P. 2, Spec. Cong. Comm. Rep. Ex. "D" Mallonee Aff. Supreme Ct.] Meetings of the stockholders of the liquidated and merged Los Angeles Bank were held, attorneys were retained, and a Complaint to be filed in the Federal Courts against the defendant Fahey calling him to account for his actions in the confiscation of the Los Angeles Bank was prepared. [R. 287.] Word of these actions reached the ears of those who had seized the Los Angeles Bank. T. A. Gregory, President of the Long Beach Federal

Savings and Loan Association, realized that his institution was in grave danger of suffering the same fate as that suffered by the Los Angeles Bank. [P. 3, Spec. Cong. Comm. Rep. Ex. "D" Mallonee Aff. Supreme Ct.] Weeks had passed since the seizure of the Los Angeles Bank, and its stockholders were having trouble raising funds to commence the litigation essential for its protection. He, therefore, suggested to the directors of the Long Beach Association the taking of measures to protect the Long Beach Association before the defendants Fahey and Ammann also struck at it. On May 8, 1946, just twelve days before the Long Beach Federal Savings and Loan Association was actually seized a resolution was adopted in the following language:

> "Whereas there have been indications that retaliation against this association by those purported to be representing the Federal supervising authorities because the representatives of this association, duly elected as a director of the Federal Home Loan Bank of Los Angeles, did not disregard the legal rights and best interests of said bank and submit to the dictation of the Federal Home Loan Bank Commissioner; and
>
> Whereas such retaliations are unwarranted and violate the principles of our democratic government and are detrimental to the best interest of this association: Now, therefore, be it
>
> Resolved, that the officers of this association be and they are hereby authorized to employ legal counsel to conduct appropriate legal proceedings to restrain said Federal Home Loan Bank Commissioner or his deputies from interfering with the normal and proper conduct of this association's affairs.

The sum of $100,000 is hereby appropriated and authorized to be expended for that purpose." [P. 21 Spec. Cong. Comm. Rep. Ex. "D" Mallonee Aff. Supreme Ct.]

On May 20, 1946, the anticipations of the directors of the Long Beach Federal Savings and Loan Association proved to be correct. The defendant Ammann with numerous deputies, physically invaded the premises of the *Long Beach* Federal Savings and Loan Association at Long Beach, California, and announced that they had taken possession of it, its business and assets. [R. 70-73.] The officers demanded written authority for such action and were told verbally that an order had been entered in Washington, D.C., a few hours before appointing the defendant A. V. Ammann as conservator and directing that he take possession of the Association. Asked for a copy of this order, the officers were refused such copy. Whereupon, the officers declined to surrender possession. The defendant Ammann then produced a one-page, typewritten docum[redacted] bearing no signature and presented it as his authority to take possession of the $26,000,000 institution. Upon defendant Ammann's attention being directed to the lack of certification of the order, he proceeded to sign his own name to his own order appointing himself as conservator, and, thereupon, demanded immediate surrender of all assets, cash and securities to him. [R. 70-74.] When the officers hesitated to comply with his demands, they were threatened by him with criminal prosecution under Federal Statutes. [R. 70-74.] By this time deputy conservators, deputy examiners and other subordinates of the defendants Fahey and Ammann had stationed themselves at the vaults, at

each of the cash drawers and all of the other places where securities and valuables were kept. The officers demanded a written receipt for the $26,000,000 in securities, cash, bearer bonds and other assets belonging to said Association as well as several million dollars worth of additional securities held by said Association for collection for certain of its customers. All such demands were refused. [R. 71-75.] The officers and others present at the time of the seizures requested from Ammann a statement of the causes for which the institution was being seized. According to disinterested witnesses Ammann stated:

> "The Association has gross assets of $26,000,000, $22,000,000 of which are savings. It is a sound, solvent, going institution."

Affiant then asked the said A. V. Ammann, "Then why are you here?" And he, said A. V. Ammann replied, "If it gets in the papers we are here, it will create a run and tear down the institution, that is why we are here."

Affiant then asked, "Do you realize what you have said?"

Said A. V. Ammann then repeated this former statement. . . . [R. 72-73.] Ammann denies having made such statements. Within a few hours after the seizure a run of withdrawals of shareholder member deposits was under way. For several days the runs were a million or more dollars per day. More than $10,000,000, almost one-half of the total deposits, were thus withdrawn in the run. [P. 1 L. D. White Aff. in Supreme Ct.] On May 27, 1946, a shareholders' committee filed their complaint in the United States District Court for

the Southern District of California, on behalf of themselves and all other shareholders of said association as a class action. [R. 1.] Honorable Peirson M. Hall, United States District Judge, on application of the plaintiff Shareholders' Committee, issued a Temporary Restraining Order restraining the defendants Fahey and Ammann from merging or re-organizing the Long Beach Federal Savings and Loan Association with any other institution pending the action of the court. [R. 27.] Proxies ratifying the action taken by the Shareholders' Committee and authorizing them to represent individual shareholders were obtained from approximately 56% of the shareholders. [P. 1 Mallonee Aff. Supreme Ct.]

On June 12, 13 and 14, the Select Committee to Investigate Executive Agencies held its hearings at Washington, D. C. Among the witnesses testifying before said committee were the defendants Fahey and Ammann, President T. A. Gregory of Long Beach Federal Savings and Loan Association and numerous others. On July 25, 1946, the Congressional Committee made its report. [P. 3 Spec. Cong. Comm. Rep. Ex. "D" Mallonee Aff. Supreme Ct.]

Being unable to ascertain from the seizure order No. 5254, [R. 75, 85, 219] what, if any, were the charges against said Association for which it had been seized, the officers and directors on May 24, 1946, requested of the defendants Fahey and Ammann a more definite statement of such charges. [R. 86.] They also requested a hearing of defendants Fahey and Ammann. Both such requests were prior to the hearing before the Congressional Investigating Committee (June 12th). After the testimony of defendant Fahey and his deputy Lee, Gov-

ernor of Federal Home Loan Bank Administration, that the matters to be determined at the hearing had already been decided in advance by both Lee (he was governor of the Federal Home Loan Bank System) and Fahey.

Lee said:

> "Mr. Lee: 'I don't think Mr. Gregory can ever get it back from that institution' (it being the Long Beach Association.) Mr. Jennings (one of Congressional Committee): 'You have destroyed it.'"

Mr. Lee: "That isn't his institution." . . . [R. 110, also R. 105.] The shareholders, officers, and directors of the seized Long Beach Federal Savings and Loan Association then realized the futility of such hearing and the impossibility of obtaining justice at such hearing. The shareholders had invoked the protection of the Federal Courts, and it became apparent that any hearing conducted by defendants Fahey and Ammann had not only been decided in advance by them but would interfere with and trespass upon the province of the Federal Courts to determine all matters of the litigation then pending in such courts. [R. 244.] In addition appellant Fahey had stated under oath before the Congressional Investigating Committee as follows:

> "Suit has been entered in the Federal Courts in an effort to gain control of this institution . . . *It is assumed that the courts will determine the justification for our action.* [R. 105.] (Emphasis added.)

This led the Shareholders Committee (as well as the Congressional Investigating Committee) to believe that defendants Fahey and Ammann would present what charges they had, to the impartial United States District

Courts for decision. Actually, however, the reverse occurred, Fahey and Ammann imposed every technical obstruction and dilatory pleading, Motions to Dismiss, etc., but never submitted their charges to the court. Temporary Restraining Orders were applied for the Shareholder's Committee and obtained from Honorable Peirson M. Hall, United States District Judge for the Southern District of California, Restraining the defendants Fahey and Ammann from holding their so-called administrative hearing and acting as judges for themselves on the issues which they had already stated under oath before the Congressional Investigating Committee that they had decided in favor of themselves and against said Association and its shareholders. [R. 244.]

Among the assets seized by defendants Fahey and Ammann and belonging to the Long Beach Federal Savings and Loan Association were approximately 8000 notes and deeds of trust with a face value of approximately $12,000,000, with an average balance of approximately $1500 each secured by conveyances in trust of the title to approximately 8000 homes situated in Los Angeles County, California which conveyance was to defendant Title Service Company, a California corporation. All of the notes were payable at the office of the Association at Long Beach, California. All of the borrowers were residents of, Los Angeles County, California. [R. 198-199.]

The defendant Ammann presented 174 of these notes together with the deeds of trust securing the same with an approximate face value of about $800,000 to defendant Title Service Company, the trustee named in said deeds of trust together with defendant Ammann's request. That the legal title to the 174 pieces of real property conveyed

by said deeds of trust to Title Service Company be reconveyed by said Title Service Company to the borrowers. [R. 34.] Title Service Company was notified by the officers and directors of the said Long Beach Federal Savings and Loan Association that a Shareholders' Committee representing the shareholders of said Association had filed action in the United States District Courts challenging the authority of defendant Ammann to transfer the assets of the Long Beach Federal Savings and Loan Association and that said officers and board of directors on behalf of said shareholders would hold defendant Title Service Company individually liable for any breach of its duty as trustee and from any loss resulting therefrom. [Part VII, R. 35.]

Plaintiffs in this action, the Shareholders' Committee, caused a copy of the Summons and Complaint to be served upon defendant Title Service Company, and defendant Title Service Company thereupon filed its answer and Cross-claim in Interpleader and in the Nature of Interpleader depositing with the Clerk of the said United States District Court in this action, the 174 notes, 174 deeds of trust, 174 requests for reconveyance executed by defendant A. V. Ammann and also placed before the District Court for disposition the question of the balance of the 8000 notes and deeds of trust with the aggregate value of approximately $12,000,000 and asked that the District Court determine its duties as trustee under all of said 8000 deeds of trust and instruct it as to which, if any, requests for reconveyance it should honor and what disposition it should make of the legal title to the 8000 homes of the borrowers from said Long Beach Federal Savings and Loan Association whose title was

held in trust by defendant Title Service Company. [R. 30-39.]

The defendant Long Beach Federal Savings and Loan Association filed its Answer to said Interpleader and its Cross-Claim against the defendants Fahey and Ammann. [R. 187-191.] The Home Investment Company, owner of the legal title to the said 174 homes had conveyed the same by various contracts of sale to numerous individuals who were making payments upon said contracts of sale to said Home Investment Company and said contracts of sale and the loans and deeds of trust in favor of said Long Beach Federal Savings and Loan Association were being refinanced by the said Home Investment Company and the said various individuals purchasing the said 174 homes. [R. 247-253.] Until a valid reconveyance, issued upon a valid request for reconveyance, (which request was executed by those having legal authority to act for said Long Beach Federal Savings and Loan Association), could be obtained no clear title to the said 174 homes could be obtained by anyone. The Home Investment Company confronted with the situation of being unable to obtain a clear title even upon payment of the said $800,000 in full to either the said defendant A. V. Ammann or the defendant Long Beach Federal Savings and Loan Association and being in jeopardy of being compelled to pay the said $800,000 a second time or of being compelled to await the final determination of the litigation in this proceeding, petitioned for leave of the United States District Court to intervene as a party in this action and make the deposit into the Registry of the court of the said sum of $800,000 and asked the aid of this court in the clearing of its title to the said 174 homes described in said notes and deeds of trust then physically

deposited in the Registry of said court by the Interpleader of said defendant Title Service Company. [R. 178.] Said Petitions for Leave to Intervene were granted, said Home Investment Company became a party to this action and did deposit in the court said sum of $800,000. [R. 319-326.] Pursuant to order of the said court, the defendant Long Beach Federal Savings and Loan Association also executed and deposited in court its requests for reconveyance of the said 174 notes and deeds of trust and the said Title Service Company, pursuant to order of the court deposited with the Clerk of the Court its reconveyances of the legal titles to the 174 homes situated in Los Angeles County, California, and by order of the court the said reconveyances were delivered to the Intervenor, Home Investment Company, which thereby obtained a clear title to the said 174 homes, and the *said sum of $800,000 by order of said court was substituted for and took the place of the said notes and deeds of trust and remains in the custody of the court* pending the further order of the court upon determination of this action. [R. 319-326.]

Dozens of other home owners similarly situated have likewise become parties in intervention to this action, deposited their money in the Registry of the Court and upon deposit with the Clerk of the Court of their notes and deeds of trust by defendant Ammann, together with requests for reconveyance by defendant Ammann and by Long Beach Federal Savings and Loan Association upon deposit of a reconveyance pursuant to order of court by

defendant Title Service Company have also obtained, with the aid of the district court, clear titles to their said homes situated in Los Angeles County, California, said Interventions have taken place both before and after the pendency of the appeal to this Honorable Supreme Court of the United States.

Defendant Robert H. Wallis had been an attorney for defendant Long Beach Federal Savings and Loan Association for many years. Pursuant to the resolution of the board of directors dated May 8, 1946 (*infra*), he had received a cashier's check for $50,000 to be used by him in defense of said Association from the efforts of defendants Fahey and Ammann to seize it. The defendants Fahey and Ammann were claiming through newspaper releases and otherwise that the appropriation of said $100,000 and the issuance of said cashier's check for $50,000 were the principal reasons and justifications for their seizure of the said Long Beach Federal Savings and Loan Association and were claiming that said resolution and appropriation were illegal and improper, and that they, the said defendants Fahey and Ammann, were entitled to the said $50,000 check. [Part IX, R. 59.] Said plaintiffs Shareholders' Committee caused a copy of the Summons and Complaint to be served upon the said defendant Robert H. Wallis and thereupon he, on June 12, 1946, filed his Answer and Cross-Claim in Interpleader in this action and deposited said $50,000 cashier's check with the Clerk of this court and asked that the court determine who was entitled to the said $50,000 check and

that the court make proper allowances from said $50,000 check upon application made to the court by various attorneys seeking to protect said Association from the attacks of the defendant Fahey and Ammann. Said $50,000 check is still in the custody of the Clerk of the District Court in the Registry thereof uncashed and unused. [R. 54-63.]

On July 15, 1946, pursuant to Section 380(a) U. S. C. the Honorable William E. Orr, Justice of the United States Circuit Court of Appeals of the Ninth Circuit, and Honorable Peirson M. Hall, District Judge of the United States District Court for the Southern District of California and Honorable Dave Ling, District Judge of the United States District Court at Phoenix, State of Arizona, convened as a Three Judge Statutory Court and heard all of the matters then before the court including the Motions for Preliminary Injunction to Restrain Merger, for Preliminary Injunction to Restrain Administrative Hearing, Motions to Dismiss the Action by Fahey and Ammann, Motions by Ammann to Dismiss the Cross-Claims in Interpleader of Title Service Company and of Robert H. Wallis, *no motions to dismiss these cross-claims were presented to the three-judge court by defendant Fahey, despite the fact that he had been served with process thereon.*

The matter was argued at length by all counsel for two days and 407 pages of Points and Authorities were submitted at the request of the three judges. The case

was under submission approximately 7 weeks and on September 5, 1946, the three judges filed their unanimous opinion holding Section 5(d) of the Home Owners Loan Act unconstitutional. [R. 374.]

On September 19, 1946, defendant Ammann filed his Objections to the Proposed Findings and Conclusions of Law and Decree submitted by appellees to the three judge court pursuant to the opinion. [R. 424.] *He also submitted proposed findings of his own which were rejected by the three judges.* [R. 434.]

On September 21, 1946, appellee's filed their Answers to Ammann's Objections to the Proposed Decree. [R. 434, 464.]

On September 25, 1946, defendant Ammann filed his Request for a Stay of Execution of the judgment not yet made or entered by the three judges. [R. 465.] Appellees filed their Objections to the Request for Stay of Execution. [R. 468.]

September 30, 1946, the three judge court made and entered its Findings, Conclusions of Law and Decree, the subject of this appeal by defendants Fahey and Ammann, and at the same time denied the Stay of Execution requested by defendant Ammann. [R. 502.]

On the first day that the officers and directors of the Association attempted to resume business under the protection of the three judge decree, a few public spirited citizens of Long Beach deposited approximately $1,000,000 in new shareholder accounts in the Association. Im-

mediately upon learning that defendant Ammann was to be restored to possession and control of the assets and business of the Association, the $1,000,000 in new deposits was withdrawn. [Pp. 6, 20 Mallonee Aff. Supreme Ct.] The Marshall was in the process of executing this decree by placing the officers of the Long Beach Federal Saving and Loan Association in possession of the Association and its assets when, on October 1, 1946, defendants Fahey and Ammann, without notice to appellees, prior to petitioning for an appeal and prior to the allowance of any appeal, applied to the Honorable Justice Wiley B. Rutledge and secured from him an Order Staying the Execution of the Decree of the three judges (not yet appealed from) and directing the return of the Association by the officers and directors to the appellants. This Order was served upon the officers and directors of the Association during the night of October 2, and was complied with by them despite the fact that at the time of said service no appeal had yet been allowed or taken.

On November 9th, 1946, appellees filed their Motion to Vacate the Order Staying the Execution of the Decree of the Three Judge Statutory Court. Numerous affidavits and exhibits were filed by both parties and the matter argued before the Honorable Justice Wiley B. Rutledge and taken under submission by him. The Stay Order was allowed to remain in effect. References throughout this brief will be made to such affidavits and exhibits as well as to the printed record.

SUMMARY OF ARGUMENT.

I. Section 5-D, H. O. L. C. Act, is unconstitutional because it denies due process.

I-A. Due process is denied because Section 5-D does not require either notice or hearing before or after re-organization, consolidation, merger, liquidation, appointment of conservator or receiver or equitable re-adjustment of the capital structure of Federal Savings and Loan Associations. All of these drastic actions directly affecting the ownership of the homes and savings of the members of such associations are authorized by the Federal Home Loan Bank without any notice, without any hearing, or any protection to the home owners and savers involved.

I-B. Section 5-D denies due process because it does not provide any fair or impartial tribunal to hear or determine the re-organization, consolidation, merger, liquidation, appointment of a conservator or a receiver, or equitable re-adjustment of capital structure, authorized by said Section.

I-C. Section 5-D denies due process because the administrative hearing created solely by implication was actually without any authority either to hear or determine.

I-D. Section 5-D denies due process because it authorizes completely unrestricted merger of solvent into insolvent associations, without limit as to number, merged place or manner of merger, all without notice or hearing either before or after such mergers.

II. Section 5-D is unconstitutional because it attempts to delegate without restriction, authority to enact the laws of the United States. Under the authority of Section 5-D appellant Fahey has attempted to deny Federal Savings and Loan Associations recourse to the courts of the United States and has attempted to deny process of subpoena *duces tecum* of the United States Courts as to all records of the Federal Home Loan Bank Administration. Such delegation is unconstitutional.

III. The District Court of Three Judges or of one Judge had jurisdiction *in rem* of the $26,000,000 in real property and other assets physically within its boundaries, seized within such boundaries by appellant Ammann as a subordinate under the authority of appellant Fahey. Such jurisdiction arises from several sources.

III-A. One source of such jurisdiction is under Title 28, Section 118, U. S. C.

III-B. Another source of such jurisdiction arises in interpleader under Title 28, Section 41, subdivision 46, U. S. C., also under general equity interpleader powers, also under Rule 22, Rules of Civil Procedure for District Courts of the United States. Such interpleader jurisdiction sustains the action regardless of the jurisdiction under plaintiffs' original Complaint. Such interpleaders involve in excess of $12,000,000. of notes and deeds of trust conveying title to real property in Los Angeles County, California.

III-C. Fahey was not an indispensable party under any theory of the action. The District Court had jurisdiction over the $26,000,000 in assets and over Appel-

lant Ammann, both of which were physically within the boundaries of the District Court and as Section 5-D was unconstitutional, process against Fahey was unnecessary.

IV. The decree of the three-judge Court ordering restoration of possession to appellees immediately upon determination that Section 5-D is unconstitutional was proper. The unconstitutional law could not be changed or made constitutional by any pleadings of appellants Fahey or Ammann and appellants only authority for seizing, or to remain in possession, fell with the unconstitutional Section 5-D.

V. Neither plaintiffs, nor the association, were estopped to assert that Section 5-D is unconstitutional because estoppel is an equitable doctrine, used to prevent, not perpetrate an injustice. The association charter, itself, granted by the five-man board (predecessors of Fahey), now the one-man commissioner, estops Fahey from adopting regulations in conflict with the charter. The appointment of the conservator, without notice, was in conflict with the charter.

VI. The Third Party Complaint of the association against Federal Home Loan Banks of San Francisco, Los Angeles, and Portland, was proper because it involved the same facts and the same law and the same appellants Fahey and Ammann as the seizures of both, the Los Angeles Bank and the Long Beach Association, both issues being determined in the main action.

ARGUMENT.

I.

SECTION 5-D, H. O. L. C. ACT, IS UNCONSTITUTIONAL, BECAUSE IT DENIES DUE PROCESS.

I-A.

Section 5-D Denies Due Process Because It Does Not Require Either Notice or Hearing.

Appellees maintain that the Act is void as beyond the constitutional power of Congress because it denies due process in many ways. Before taking up in detail the numerous ways in which this act arbitrarily and dictatorially nullifys the Constitution of the United States, the general requirements of due process might advantageously be reviewed. Due process requires that the protection of "due process of law" be guaranteed BY THE ENACTMENT ITSELF. A matter so vital to the liberty and freedom of the nation does not rest on the mere whim or caprice of the official or officer adopting the regulations or enforcing the Act. If the Act itself does not require the observance of constitutional requirement of due process, the enactment is void. The mere accident that the officer or official in the particular case, as a matter of favor or largess, did in the particular instance observe some, or even all, of the essentials of due process, does not cure the Unconstitutional Act.

Due process is a constitutional guarantee of the liberties of the people against encroachment of tyrants and dictators, and the fact that the dictator as a matter of courtesy in one instance grants due process and at his pleasure in another, denies it, is all that is required to

demonstrate that the Act itself and not the mere action of the officer is unconstitutional and void. The freedom and liberties of the American people, bought at so dear a price since the founding of the Republic, are not subject to the whims or caprice of any official or officer nor even to the encroachment of Congress itself. If the enactment of Congress does not meet the constitutional requirement of due process, the Act and all powers conferred under it are void. The leading case on this subject is:

Coe v. Armour Fertilizer Works, 237 U. S. 413, 59 L. Ed. 1027, U. S. Supreme Court (1915).

. . . . Constitutional Law—due process of law—notice and hearing.

6. Extra-official or casual notice, or a hearing granted as a matter of favor or discretion in proceedings for the taking of one's property to satisfy his alleged debt or obligation, is not a substantial substitute for the due process of law which U. S. Const., 14th Amend., requires.

. . . . "To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits. Rees v. Watertown, 19 Wall. 107, 123, 22 L. Ed. 72, 77.

"Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires. In Stuart v. Palmer, 74 N. Y. 183, 188, 30 Am. Rep. 289, which involved the validity of a statute providing for assessing the expense of a local improvement upon the lands benefited, but without notice to the owner, the court said:

'It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard.' The soundness of this doctrine has repeatedly been recognized by this court. Thus, in Security Trust & S. B. Co. v. Lexington, 203 U. S. 523, 333, 51 L. Ed. 204, 208, 27 Sup. Ct. Rep. 87, the court, by Mr. Justice Peckham, said with respect to an assessment for back taxes: 'If the statute did not provide for a notice in any form, it is not material that as a matter of grace or favor notice may have been given of the proposed assessment. It is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case that is material, but *the question is whether any notice is provided for by the statute.*' (citing the New York case). So, in Central of Georgia R. Co. v. Wright, 207 U. S. 127, 138, 52 L. Ed. 134, 141, 28 Sup. Ct. Rep. 47, the court said: '*This notice must be provided as an essential part of the statutory provision, and not awarded* as a mere matter of favor or grace.' In Roller v. Holly, 176 U. S. 398, 409, 44 L. Ed. 320, 524, 20 Sup. Ct. Rep. 410, the court declared: 'The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion.' And in Louisville & N. R. Co. v. Central Stock Yards Co., 212 U. S. 132, 144, 53 L. Ed. 441, 446, 29 Sup. Ct. Rep. 246, it was said: 'The law itself must save the parties' rights, and not leave them to the discretion of the courts as such.'". (Emphasis added.)

A moment's reflection will demonstrate the necessity of this rule. Were the law otherwise, no Act of Congress, of itself, could ever be unconstitutional. The only thing

that could be unconstitutional would be the particular Act of the particular officer or official in the particular case. He, not the Congress of the United States, would be determining the law and determining whether or not the law was constitutional. The law would be constitutional in the cases in which he chose to observe due process, and unconstitutional only in the cases in which he denied it, and there would never be any need for a three-judge statutory court nor for Title 28, Section 380(a), U. S. C. Needless to say, the confusion incident to such a rule would be unimaginable. One decision of the Supreme Coprt could never settle the constitutionality of any Act of Congress. All that the courts could determine would be the particular act of each particular official, if, as, and when he performed such act, if the official chose to observe the Constitution, the Act of Congress would be valid, but only for that case and if he chose to ignore it, the *Act of Congress would be* INVALID BUT ONLY FOR THAT CASE. Therefore, the salutary rule that the requirements of due process must be met by the Act itself. Then the simple question is posed; if the official does not observe the requirements of the Constitution, his act is not only unconstitutional, but he is violating the exact terms of the law under which he purports to act. His act is then clearly void as beyond the terms of and contrary to the Act of Congress. Therefore, the requirements of Section 380(a) constitutes a special court of three judges to determine the constitutionality of the ACT OF CONGRESS ITSELF. Which judgment, when reviewed by the Supreme Court of the United States, determines for all cases and for all matters whether the Act of Congress is constitutional or is void. The importance of due process cannot be over-emphasized. It is the sole dis-

tinction between tyranny and freedom. The only difference between Hitler's Germany, Mussolini's Italy, Stalin's Russia, and all the other tyrants back through history on the one hand, and liberty loving free America on the other, is the requirement of a written Constitution as carried out by due process of law.

In Hitler's Germany the citizen is awakened in the middle of the night, torn from his family and led to his execution. He was, of course, denied all opportunities for notice, hearing and trial. He never knew what he was charged with. It made no difference. He was shot that night by order of the dictator.

In a lesser sense, iinvolving property rather than human life, this same thing happened to the Federal Home Loan Bank of Los Angeles. Without notice, without hearing, without trial or judges, the gestapo on the morning of March 29, 1946, marched into the offices of the $43,000,000 Los Angeles Bank which was then completely solvent, had a surplus of approximately $1,900,000, had been charged with nothing, and presented an order of the dictator, defendant in this action which order read in substance, "the Federal Home Loan Bank of Los Angeles is liquidated; its charter is forfeited." [R. 293-295.]

And this, these defendants contend, was due process of law under the United States Constitution in free America. The inquiry naturally arises, what has this to do with the seizure of the Long Beach Federal Savings and Loan Association?

The President of the Long Beach Federal Savings and Loan Association was one of the directors of the seized, merger and liquidated Federal Home Loan Bank of Los

Angeles. The Long Beach Federal Savings and Loan Association owned about $360,000 worth of stock in the seized, merged and liquidated Federal Home Loan Bank of Los Angeles. T. A. Gregory, the President of the Long Beach Federal Savings and Loan Association believed that in free America, the Federal Home Loan Bank of Los Angeles had a right to be heard in the Federal Courts. He, therefore, became the rallying point and leader of the stockholders of the seized Federal Home Loan Bank of Los Angeles, and the stockholders of said seized bank met, formed committees, organized, obtained a permit from the Corporation Commission of the State of California to solicit funds for employment of counsel and were about to institute an action in the Federal District Court against THE DICTATOR FAHEY AND HIS COHORTS calling into question this tyrannical, one-day, instantaneous liquidation, merger and dissolution.

The Congress of the United States became interested and hearings before the Select Committee of the House of Representatives to Investigate Executive Agencies Which Exceed Their Authority were scheduled. [Spec. Cong. Committee Ex. "D", Mallone Aff. Supreme Court.]

The President of the Long Beach Federal Savings and Loan Association, T. A. Gregory, was one of the witnesses who was scheduled to appear before this Congressional Investigating Committee to give testimony. By now he commenced to comprehend that even in free America, he and his institution were in very genuine peril. Nevertheless, he was a man of courage and he believed that the fight for freedom would be vindicated. He brought the matter before his board of directors, and having seen the pitiful inadequacy of those attempting to

defend the merged, liquidated and dissolved institution, the Los Angeles Bank, after the gestapo had acted, his board of directors adopted the following resolution:

"WHEREAS, there have been indications that retaliation against this association by those purporting to be representing the Federal supervising authorities, because the representative of this Association duly elected as a director of the Federal Home Loan Bank of Los Angeles—did not disregard the legal rights and best interests of said bank and submit to the dictation of the Federal Home Loan Bank Commissioner; and

WHEREAS, such retaliations are unwarranted and violate the principles of our democratic government and are detrimental to the best interests of this association;

NOW, THEREFORE, BE IT

RESOLVED, that the officers of this association be, and they are hereby, authorized to employ legal counsel to conduct appropriate legal proceedings—to restrain said Federal Home Loan Bank Commissioner or his deputies from interfering with the normal and proper conduct of this association's affairs.

The sum of $100,000 is hereby appropriated and authorized to be expended for that purpose."

Matters proceeded among the stockholders of the seized and destroyed Federal Home Loan Bank of Los Angeles to a point where action was about to be commenced in the Federal Courts. The dictator got wind of the insurrection. Apparently these stockholders thought they had a right to appeal to the courts or thought they had some rights that the dictator must observe. Another lesson was

needed; another example must be made. The gestapo must call again. On Monday, the 20th day of May, 40 days after the Los Angeles Bank liquidation, again without notice, and without hearing the conservator, the defendant A. V. Ammann, was appointed by the dictator Fahey for the Long Beach Federal Savings and Loan Association, an institution which then had $26,000,000 in assets, was completely solvent, had a $1,300,000 surplus, had 16,000 shareholder members and 8000 borrowers.

This time, however, the dictator felt the need of a pretext. In the seizing and dissolving of the Los Angeles Bank, which was a rediscount bank and did not accept deposits from the general public, no sham of any kind was necessary. Simply one scratch of the dictator's pen and the Los Angeles Bank was dissolved, merged and liquidated as of the moment of the signing of the order, but in the Long Beach Federal Savings and Loan Association case, the dictator was touching directly on the people's savings. The instant the shareholders learned that a Federal officer had appointed a conservator, they swarmed down to draw out their money, and very wisely so. Within a very few days nearly one-half of all of the deposits, in excess of $10,000,000 was withdrawn. This run is the only thing that saved the Long Beach Federal from the fate of the Federal Home Loan Bank of Los Angeles. With a run of millions of dollars a day in progress, even the dictator Fahey dared not merge the Long Beach Federal Savings and Loan Association, at least until the run subsided, and that gave time for recourse to the Courts.

The seizure of the Long Beach Federal Savings and Loan Association obviously had several purposes, one, to

intimidate its President, T. A. Gregory, so that he would not testify before the Congressional Investigating Committee against the very dictators who then were in control of his Association which represented 12 years of his work and, two, also as a summary warning to any other stockholders of the seized Federal Home Loan Bank of Los Angeles as to what their fate would be if they had the temerity to let their institutions (also Savings and Loan Associations, many of them under the reign of the dictator Fahey) become parties to the contemplated litigation in the Federal Courts concerning seizure of the Los Angeles Bank. But here the dictator made the error which will bring about his downfall. He misjudged the temper of an aroused American citizenry fighting for their freedom from interference with their savings and their homes. A committee of the shareholder depositors of the seized Long Beach Federal Savings and Loan Association was formed. It brought the instant action as representatives of the class of all such shareholder members and obtained proxies from and represented in excess of 56% of all of such shareholder members. Upon the filing of the Complaint in the Federal District Court in Los Angeles, California, a Temporary Restraining Order was issued *ex parte* preventing the dictator Fahey from merging the Long Beach Federal as he had merged the Los Angeles Bank.

The Congressional Investigating Committee, incredulous at first at the seizure, merger and liquidation of the Los Angeles Bank, immediately took action with a very few days after the seizure of the Long Beach Federal Savings and Loan Association and investigated both such seizures. The hearings were commenced on June 12,

1940. The dictator Fahey testified before this Committee as did many of his cohorts. It is interesting to observe that they stated to the Committee that their reasons or justifications for seizure of these institutions admittedly solvent, prosperous and liquid, both with a surplus exceeding a million dollars, would be submitted to the courts.

Fahey said:

> "Suit has been entered in the Federal Court in an effort to regain control of this institution. Gregory has set up the false and hypocritical cry that I acted in this matter in reprisal against him because of his effort to force the election of Berry as president of the Federal Home Loan Bank, the Los Angeles Bank. It is assumed that the courts will presently determine the justification for our action." [R. 105.]

It is still more interesting to observe that the only defense these defendants made in court was to deny the power of any courts to review their actions. In due course, the Congressional Investigating Committee brought in its report which is in the record of this case as Exhibit D, attached to the Affidavit of Paul Mallonee in Supreme Court in Support of the Motion to Vacate Order Staying Execution. The recommendations of the Report were in part,

> (4) "That the Commissioner revoke the order appointing a conservator for the Federal Savings and Loan Association of Long Beach and restore the assets and affairs of the association to its duly elected management."

(5) "That the appropriate committees of Congress give consideration to the necessity of amending the Federal Home Loan Act in the following particulars."

(c) "Prohibiting the agency from appointing conservators for any member association, except under specific and well-defined limitations."

The Congressional Investigating Committee emphatically ruled against the dictator. Of course, this did not in any way change his dictatorial actions. Motions for Preliminary Injunctions came on for hearing before the three judge statutory court (constituted under Section 380(a) U. S. C. A.) before the Honorable William E. Orr, Circuit Judge for the Ninth Circuit, United States Court of Appeals; Peirson M. Hall, District Judge; and David W. Ling, District Judge. After full argument and submission of Points and Authorities, these three judges unanimously ruled that the Act of Congress purporting to give the dictator Fahey his dictatorial powers was unconstitutional and void, and that, therefore, all actions taken by the dictator, his conservator and their cohorts were also void and gave judgment for the restoration of the seized Long Beach Federal Savings and Loan Association to its officers and directors. Upon seeing that the Congress of the United States and the Federal Courts were still protecting the citizens against tyranny, the thus far intimidated shareholders of the Federal Home Loan Bank of Los Angeles also filed their action in the District Court of the United States at Los Angeles, California, which action is now pending, titled:

In the District Court of the United States
for the Southern District of California

No. 5677-W.M.

Complaint to Enforce Legal and Equitable Claims to, to Obtain Possession of and to Remove Liens From and Clouds Upon Title to, Property and for Other and General Relief.

Federal Home Loan Bank of Los Angeles, a body corporate, Coast Federal Savings and Loan Association, an incorporated association, Standard Federal Savings and Loan Association, an incorporated association, First Federal Savings and Loan Association of Wilmington, an incorporated association, Central Building and Loan Association, an incorporated association, State Savings and Loan Association, an incorporated association, Los Angeles American Savings & Loan Association, an incorporated association, Plaintiffs, vs. Federal Home Loan Bank of Portland, sometimes known and referred to as Federal Home Loan Bank of San Francisco, a body corporate, John H. Fahey, individually, John H. Fahey, as chairman of The Federal Home Loan Bank Board and purportedly serving as Federal Home Loan Bank Commission, and Sixteen Does, Defendants.

Characteristically dictator Fahey makes the same defense to this action. He is beyond the power of all courts. His Motions to Dismiss for lack of jurisdiction are also pending, as yet undetermined in said action.

The real issue of this case is dictatorship and tyranny vs. freedom and liberty. Due process of law is the distinguishing feature. Under tyranny there is no need of due process; the will of the tyrant is the Supreme

law of the land. The citizen is executed, his property is seized, his savings are merged, his financial institutions liquidated, (the word liquidated has come to have a special meaning under dictatorship. It has grown from its financial meaning to also involve the life of the subject), all without notice, without hearing, without trial.

Due process is the exact reverse of this. Due process requires notice, presentation of charges, an opportunity for a defense and above all due process requires an impartial disinterested tribunal. The dictator reviewing his own tyrannical acts is not due process. The growth of the word liquidated as used during the reign of terror of the gestapo in Germany and Italy and Russia, clearly indicates the danger to which this type of action by tyrannical officials leads. It is but a series of steps from liquidating a $43,000,000.00 institution by the scratch of a pen to liquidating the savings and homes of the members of the Long Beach Federal Savings and Loan Association to liquidating the citizens themselves if they make too vehement a protest. When the findings of the Congressional Investigating Committee and the judgment of the three judge court in Los Angeles are affirmed and upheld, as we are convinced they will be by this Honorable Court, the growth of tyranny and dictatorship will be abruptly checked in free America. The citizens will have no cause to wonder whether the liquidation of savings and homes may some day grow into the liquidation of protesting citizens. When the dictator and tyrant knows that his acts must be justified before an impartial Federal Court, with public sessions held in the community of the thousands of citizens whose savings and homes are being "liquidated", he will not usurp unconstitutional

powers to coerce and intimidate those protesting against his tyranny.

Due process was won in ancient times against the kings of England by force of arms of the revolting people. It was preserved in our Constitution by force of arms of the revolting colonists. It is being defended in this court against the tyrannical oppression of the dictator Fahey by orderly presentation in courts of justice. We are confident that in free America neither force of ballots nor force of arms will again be necessary to preserve the liberties of due process.

Much beclouding of the issue will undoubtedly be raised by appellants on grounds of supervision of institutions receiving the people's savings and of "protecting" of the small depositors and the small home owners. With the principle supervision and protection we heartily agree, but tyranny and despotism do not aid in such protection. They merely break down the liberties and freedom of the citizens.

If there was any action required for the protection of anyone connected with the Federal Home Loan Bank of Los Angeles, this action could and should have been taken after due notice, hearing and process. The justifications, if any, for the one day liquidation could certainly have been made to the Congressional Investigating Committee or to the courts now trying the matter. If the act was not one of tyranny, why the one day, instantaneous, liquidation, merger and dissolution?

If supervision or regulation of any of the matters connected with the Long Beach Federal Savings and Loan Association were required, this also could and should

have been done, upon notice, after hearing and with an opportunity to correct any matters objected to by those purportedly supervising and regulating.

It is not necessary that every Federal Savings and Loan Association and every Federal Home Loan Bank in the United States shall owe its existence from moment to moment and hour to hour to the unrestrained whim and caprice of one tyrannical dictator in order to protect the savings of the people and if it were so necessary, far better that no such institutions ever exist. Dictatorship and tyranny are insidious, creeping, growing things. We must never forget that Hitler was once elected. This, however, was the last election in Germany.

This case illustrates more clearly than any argument the urgency of the requirement that due process be expressed in the Act of Congress itself. If delegated as the Act attempted to here, to a five-man board, in a few years the five-man board is replaced by the one-man dictator, and the delegated power to make the laws of the United States is exercised to deny the recourse to the courts as was done in the regulations adopted by appellant Fahey. Every savings institution under the reign of this dictator exists at his sole sufferance. At any hour of the day or night an official may walk in with an order as these very defendants walked into the Federal Home Loan Bank of Los Angeles and say, "yesterday you were merged, liquidated and dissolved by an order signed in Washington." And this will be the first intimation that the citizens have that the dictator has struck. Or, as happened in the Long Beach Association case, one of the dictators deputies walks into the citizen's office and says, "Your institution is taken over; I am the conservator; I

was appointed in Washington, D. C., 3000 miles away, this morning," and when asked for any proof whatever of his statement, the seizing officer calmly signs his own name to his own seizing order appointing himself as conservator and demands the instant surrender of $26,000,000 of assets upon penalty of federal criminal prosecution for resisting an officer of the United States. Such is the testimony of the seizing officer himself [p. 202, line 9, printed record]:

> "Mr. Ammann. He asked me for a copy of this. I hesitated because I explained to him that it had come to me over the phone. I didn't know whether it was typographically correct and he had no objection to me giving it to him subject to the fact that he could find out whether it was certified or not. I told him that someone was on the way from Washington with certified copies that day; that he could have one. He was willing to take the one I had, and I certified it and gave it to him."
>
> [Page 202, line 23]
>
> "Mr. Ammann. In matters of this character where distance is a great element, you can't enter an order here and then have somebody go 3,000 miles with it and take possession of an institution where that is necessary, with any element of surprise; and surprise is an important element, in my judgment, in accomplishing that."

The only thing missing from the seizure order was the phrase, "Heil Hitler."

That such an act could take place in free America is beyond belief. The Honorable Supreme Court's burden in deciding this case is indeed heavy. Your Honors will un-

doubtedly be confronted with an enormous smoke screen of "supervision" and "regulation" and "protection of the savings of the people." Such beneficient purposes have no need of tyrannical dictatorship for their execution. The savings of the people in state chartered savings and loan institutions are amply protected by requiring the interpossession of an independent court in all questions involving receivership, conservatorship, involuntary liquidation and involuntary merger.

It is interesting to observe from what the dictator "protected" the savings of the people. The Long Beach Federal Savings and Loan Association was founded in 1934 by these very same officers and directors from whom it was seized by the dictator Fahey. At that time it had assets of $7500. Under these same directors and officers it grew in twelve years in 1946 to $26,000,000 with a surplus of $1,300,000. It had uniformly paid dividends sometimes as high as 4% per annum, from the date of its inception to the date of its seizure. During the last month before it was seized (April, 1946), its growth in shareholder accounts was approximately *$537,956.15.* With this sort of twelve year record of solvency, prosperity and phenomenal growth, the savings of the public in this institution suddenly, for some undisclosed reason, needed the "protection" of the dictator Fahey. As he "protected" the Federal Home Loan Bank of Los Angeles he started to "protect" the Long Beach Federal Savings and Loan Association. The liquid condition of the Long Beach Federal Savings and Loan Association may well be judged from the fact that when the run ensued upon its seizure by defendants Fahey and Ammann, they, from its assets, net more than $10,000,000 in withdrawals, nearly 50%, in a very few days.

I-B.

Section 5-d Denies Due Process Because It Does Not Provide an Impartial Tribunal.

The Anglo-American principle of due process is completely summed up in the language of the street as "fair play." As distinguished from the execution without trial gestapo methods of the Eureopean tyrannies and dictatorships, the Anglo-American principle is that even the sovereign rules, whether king or Congress, is subject to restraints upon the exercise of its powers. The most important of these restraints is that of due process which consists of several vitally indispensable elements. The accused, whether in jeopardy of his life or liberty or merely of his property, and whether an individual or corporation is entitled by the requirements of due process to the following:

1. Notice. Notice of what he is charged with, where and when this charge is to be made and before whom, and by what authority he is to be tried.

2. He is entitled to a trial and hearing. This means an opportunity for an orderly presentation by both sides of the matters for and against the decision sought from the tribunal.

3. He is entitled to duly constituted tribunal WITH AUTHORITY TO COMPEL THE PRODUCTION OF EVIDENCE BOTH for and against the accused.

4. And most important of all THE ACCUSED IS ENTITLED TO AN IMPARTIAL TRIBUNAL.

There are unquestionably other elements of due process not here involved, by their conspicuous absence from these seizures. EVERY ONE OF THE FOUR ELEMENTS above

enumerated, notice, hearing, duly constituted tribunal, and impartial tribunal were completely flouted and ignored *by the Act of Congress itself* in both the Los Angeles Bank and the Long Beach Federal Savings and Loan Association seizure and confiscation.

From the time of the first expression of due process, Magna Carta, nearly 900 years ago, the Anglo-Saxon sense of fair play as expressed in due process has insisted that no man can be judge in his own case. The latest expression of this doctrine is in the:

U. S. A. v. United Mine Workers, John L. Lewis, et al., 759-760, 781, 782 and 811 October Term (1946).

"The historic phrase 'a government of laws and not of men' epitomizes the distinguishing character of our political society. When John Adams put that phrase into the Massachusetts Declaration of Rights he was not indulging in a rhetorical flourish. He was expressing the aim of those who, with him, framed the Declaration of Independence and founded the Republic. *'A government of laws and not of men' was the rejection in positive terms of rule by fiat, whether by the fiat of governmental or private power. Every act of government may be challenged by an appeal to law*, as finally pronounced by this Court. . . . . So strongly were the framers of the Constitution bent on securing a reign of law that they endowed the judicial office with extraordinary safeguards and prestige. *No one, no matter how exalted his public office or how* righteous his private motive, *can be judge in his own case.* That is what courts are for. And no type of controversy is more peculiarly fit for judicial determination than a controversy that calls into question the power of a court to decide. Controversies over 'jurisdiction' are apt to raise difficult technical

problems. They usually involve judicial presuppositions, textual doubts, confused legislative history, and like factors hardly fit for final determination by the self-interest of a party. . . . . Whether a defendant may be brought to the bar of justice is not for the defendant himself to decide. . . . The most prized liberties themselves presuppose an independent judiciary through which these liberties may be, as they often have been, vindicated. When in a real controversy, such as is now here, an appeal is made to law, the issue must be left to the judgment of courts and not the personal judgment of one of the parties. This principle is a postulate of our democracy. . . . . There can be no free society without law administered through an independent judiciary. If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny. . . . *The greater the power that defies law the less tolerant can this Court be of defiance.*" (Emphasis added.)

The situation of an interested party pretending to administer justice as between himself and the helpless defendants is so abhorrent to all of the rules of due process that the tiniest amount of self-interest has been held to completely disqualify the judge or other official administering justice in hearing the case or determining the matter. An illustration of how far this doctrine of preserving the fairness and impartiality of the tribunal has been carried is the case of:

Tumey v. Ohio, 273 U. S. 510, 47 S. Ct. 437, 71 L. Ed. 749 (1927).

"JUDGE—INTEREST—DISQUALIFICATION.

(1) Officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided.

CONSTITUTIONAL LAW—DUE PROCESS—BIAS OF JUDGE.

(2) Accused is unconstitutionally deprived of due process of law if his liberty and property are subject to the judgment of a court the judge of which has a direct and substantial pecuniary interest in reaching a conclusion against him.

JUDGE—DISQUALIFICATION—RIGHT OF ACCUSED.

(11) Accused has a right to an impartial judge regardless of the evidence against him and may halt the trial by objections reasonably raised because of the disqualifications of the judge.

'It is finally argued that the evidence shows clearly that the defendant was guilty and that he was only fined $100 which was the minimum amount and therefore that he cannot complain of a lack of due process, either in his conviction or in the amount of the judgment. The plea was not guilty and he was convicted. *No matter what the evidence was against him, he had the right to have an impartial judge.* He reasonably raised the objection and was entitled to halt the trial because of the disqualification of the judge which existed both because of his direct pecuniary interest in the outcome and because of his official motive to convict and to graduate the fine to help the financial needs of the village. There were thus presented at the outset both features of the disqualifications. The judgment of the Supreme Court of Ohio must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.'" (Emphasis added.)

The insignificant personal interest of the trifling sum of costs to be received by the judge from the convicted misdemeanor offender was held in this case to be a denial of an impartial tribunal of a fair hearing, and, there-

fore, a denial of due process. In the light of this decision let us consider the "administrative hearing", enjoined by the Honorable Three Judge Court at Los Angeles and, according to the contentions of appellants, the only remedy available to the defendant Long Beach Federal Savings and Loan Association.

Dictator Fahey who had summarily merged, liquidated and dissolved without notice, without hearing and without cause, the $43,000,000.00 Federal Home Loan Bank of Los Angeles and who had similarly, without notice, without hearing and solely to intimidate those about to litigate with him the justification of his former seizure, also appointed a conservator for the Long Beach Federal Savings and Loan Association, was to act as judge, jury, prosecutor, and executioner and determine for himself and by himself whether or not the acts he had previously committed were right or wrong. His determination of his own case by himself was to be the only hearing or trial ever accorded to the defendant Long Beach Federal Savings and Loan Association, and this is said by the appellants Fahey and Ammann to be entirely constitutional and full due process of law. Needless to say, the Act itself does not so provide, but the failure of the Act of Congress, Section 5D, Home Owners' Loan Act which reads:

> "Sec. 5(d) The Board shall have full power to provide in the rules and regulations herein authorized for the reorganization, consolidation, merger, or liquidation of such associations, including the power to appoint a conservator or a receiver to take charge of the affairs of any such association, and to require an equitable readjustment of the capital structure of the same; and to release any such association from such control and permit its further operation,"

to provide for any due process, notice, trial, or impartial tribunal, is one of the reasons that this section was held unconstitutional by the three judge court. In ordinary cases some presumption might be indulged that even though interested in justifying his own acts, the Commissioner might be presumed to be impartial. No such presumption can exist in this case. The circumstances of the seizures alone completely refute the probability of impartiality, but the matter is closed to any further question by the testimony of Fahey and of Harold Lee (who is Fahey's chief deputy, who claims that he and not Fahey made the decision for the seizures), before the Congressional Investigating Committee. In the first hectic days after the seizure, counsel for the Association advised it to request a more definite statement of reasons for the appointment of the conservator and to also request an administrative hearing from the seizing commissioner. Needless to say, this was before the Congressional testimony of Fahey and Lee. When Fahey and Lee both swore under oath before the Congressional Investigating Committee investigating their seizures that they who purported to act as their own judges in their own case had already decided the matter before the submission of any evidence, before any hearing, in fact before even the filing of the charges, the submission to a farcical hearing became clearly impossible. The testimony of Lee and Fahey was as follows:

"Mr. Fahey: It would have to go out of business as a Federal, certainly. It could change to a guaranteed stock State chartered institution if it wanted to, provided the State of California would give them a charter.

Mr. Fishbach: Provided they could get a State Charter?

Mr. Fahey: Yes, I doubt if Mr. Gregory would get one. [R. 104.]

Mr. Fahey: This money would never have been advanced to these associations, *they would have never secured Federal charters,* and we would not be here today if the Federal Home Loan Bank board had been informed of the unscrupulous practices of the Gregory's in connection with the affairs of the Reliable Savings and Loan Association of Long Beach, which had to be taken over by the State of California just before they obtained the Federal charters to which I have referred." (Emphasis added.) [R. 105.]

Governor Lee of Federal Home Loan Bank Administration said:

"You haven't heard the other side of the case yet, Congressman, and when this is finally determined in court, I am sure, quite confident, that it will be determined favorable to the Federal Home Loan Bank Administration, and I think if you don't withhold opinion, you will be embarrassed, because we have the facts.

Mr. Jennings: I . . . not going to be embarressed.

Mr. Lee: *I don't think Mr. Gregory can ever get it back from that institution.*

Mr. Jennings: You have destroyed it.

Mr. Lee: That isn't his institution. . . . They are afraid that this group may get back into possession of that institution, and *I am afraid that they will get back* and hurt it." (Emphasis added.) [R. 110.]

After such testimony, the enjoining of such hearing by Restraining Order and Preliminary Injunction became the impelling duty of every court to which the matter was submitted if justice still prevailed in free America.

For the "judge," who has already publicly under oath announced his decision, in advance of the hearing in which he judges his own conduct and decides whether he was right or wrong in acts he has previously done, to insist that the helpless defendants must submit to this farce, as their only recourse and as complete due process, is beyond even the ambitions of the notorious Star Chamber during the reign of the English tyrants. Even Hitler's gestapo did not go through the farce of pretending to try the victim. That there may be no doubt, the so-called Order for the hearing is as follows:

"FEDERAL HOME LOAN BANK ADMINISTRATION.

Order No. 5309. Date June 5, 1946.

Whereas, a conservator has been appointed for the Long Beach Federal Savings and Loan Association, Long Beach, California; and

Whereas, an answer has been filed and written demand made for a hearing, pursuant to Section 206.2 of the Rules and Regulations for the Federal Savings and Loan System:

It is hereby ordered, that a hearing shall be held at Room 510 Chester Williams Building, 215 West Fifth Street, Los Angeles, California, on Wednesday, the third day of July, 1946, at 10:00 o'clock in the forenoon, before a Hearing Officer, at which hearing the Long Beach Federal Savings and Loan Association, Long Beach, California, may appear and show cause why the conservator should not have been ap-

pointed and why an order should be entered by the Federal Home Loan Bank Administration discharging the conservator;

And it is further ordered, that any person, partnership, association, or corporation claiming to have an interest in the subject matter involved may, at any time before the closing of the hearing, file a petition for leave to intervene at said hearing;

And it is further ordered, that the said Long Beach Federal Savings and Loan Association, any member or creditor thereof, the Federal Home Loan Bank Administration, and any party whose petition for intervention has been allowed, shall have the right, by counsel or otherwise, to appear and be heard at the hearing, to produce, examine, and cross-examine witnesses, to introduce documentary or other evidence, and to file briefs and reply briefs;

And it is further ordered, that the said Hearing Officer shall have complete charge of said hearing; may receive, admit, allow, exclude and deny petitions and evidence, including the hearing of testimony according to the rules of evidence governing civil proceedings in matters not involving trial by jury in the courts of the United States, provided, however, that such rules may be relaxed by the said Hearing Officer in order to promote the just determination of the ultimate issue; may limit the time within which briefs and reply briefs may be filed and may require the furnishing of copies thereof to other parties; shall order the preparation of a record, including a transcript of the testimony and evidence presented; may make rulings and note exceptions, but shall not have power to decide any motion to dismiss the proceedings or other motion that involves final determination of the ultimate issue; may hear arguments; may adjourn the said hearing from time to time, if, in his judgment, it is desirable to the orderly conduct of

the said hearing or to promote the just determination of the ultimate issue; and may do all such things and have all such powers as are necessary or proper to the orderly conduct of said hearing or to promote the just determination of the ultimate issue, but shall not have power to finally determine the ultimate issue;

And it is further ordered, that after the close of the hearing the said Hearing Officer shall transmit as promptly as possible to the Secretary to the Federal Home Loan Bank Administration the complete transcript of testimony taken, together with any exhibits, briefs, or other material incorporated in the record of said hearing;

And it is further ordered, that the Secretary or an Assistant Secretary shall advise all parties appearing at said hearing in person or by attorney, by registered mail, return receipt requested promptly upon receipt of said transcript, of the filing thereof, and shall make such transcript available for inspection by any such party and supply a copy thereof, upon request, to any such party and supply a copy thereof, upon request, to any such party at a price which will cover the reasonable cost of its preparation, as determined by the Secretary.

And it is further ordered, that notice of the hearing herein provided for shall be served by the Secretary to the Federal Home Loan Bank Administration by mailing a copy of this order by registered mail to Long Beach Federal Savings and Loan Association, c/o its President, T. A. Gregory, 350 E. Fourth Street, Long Beach, 2, California.

* * * * * * * * * *

I hereby certify that the above is an order issued by the Federal Home Loan Bank Administration on June 5, 1946.

(Seal) J. FRANCIS MOORE,
Secretary."

The court will observe that the so-called hearing officer had no power of decision. He was an errand boy. And he submitted the results of his errands to Fahey and Lee who would decide their own case for themselves. Even if the Act of Congress had provided for hearing and authorized some procedure, *which it did not,* due process would have been denied by the publicly pre-announced decision of the trial judge.

Morgan v. U. S., 82 L. Ed. 1129 (1937), 304 U. S. 158, S. Ct. 999.

Appeal from District Court of Three Judges, dismissal of bills of complaint in fifty suits involving the validity of an order as the Secretary of Agriculture fixing maximum rates to be charged by stockyards. The question was the validity of a regulation order adopted by the Secretary of Agriculture, indirectly of course involving the validity of the act of congress authorizing the regulation.

> "On this appeal, plaintiffs again contend (1) that the secretary's order was made without the hearing required by the statute, and (2) that the order was arbitrary and unsupported by substantial evidence.
>
> "The first question goes to the very foundation of the action of administrative agencies entrusted by the Congress with broad control over activities which in their detail cannot be dealt with directly by the legislature. The vast expansion of this field of administration regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that *the legislature* shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand a

'fair and open hearing'—essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as 'inexorable safeguard.' St. Joseph Stock Yards Co. v. U. S., 298 U. S. 38, 73, 80 L. Ed. 1033, 1052, 56 S. Ct. 720; Ohio Bell Telephone Co. v. Public Ut. Comm., 301 U. S. 292, 304, 305, 81 L. Ed. 1093, 1101, 1102, 57 S. Ct. 724; Railroad Commission v. Pac. Gas and Electric Co., 302, U. S. 388, 393, *ante*, 319, 58 S. Ct. 334; Morgan v. U. S., 298 U. S. 468, 80 L. Ed. 1288, 56 S. Ct. 906, *supra*. And in equipping the Secretary of Agriculture with extraordinary powers under the Packers and Stockyards Act, the Congress explicitly recognized and emphasized this requirement by making his action depend upon a 'full hearing.' Sec. 310. . . . 'Part from what was said on its behalf in the oral argument, the government formulated no issues and furnished appellants no statement or summary of its contentions and no proposed findings. Appellants request that the examiner prepare a tentative report, to be submitted as a basis for exceptions and argument, was refused.'

". . . . Those who are brought into contest with the government in quasi-judicial proceeding administered at the control of their activities are entitled to be fairly advised of what the government proposes and to be heard upon its proposals before it issues its final comment.

"No such reasonable opportunity was accorded appellants.

". . . Congress in requiring a 'full hearing' had regard to judicial standards—not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due

process in a proceeding of a judicial nature. If in an equity cause, a special master or the trial judge permitted the plaintiff's attorney to formulate the findings upon the evidence conferred *ex parte* with the plaintiff's attorney regarding them, and then adopted his proposals without affording an opportunity to his opponent to know their contents and present objections, there would be no hesitation in setting aside the report or decree as having been made without a fair hearing. The requirements of fairness are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps.

"The answer that the proceeding before the Secretary was not of an adversary character, as it was not upon complaint but was initiated as a general inquiry is judicial. It has regard to the mere form of the proceeding and ignores realities. In all substantial respects the government acting through the Bureau of Animal Industry of the Department was presenting the proceeding against the owners of the minor agencies. The proceeding had all the essential elements of contested litigation with the government and its counsel on the one side and the appellants and their counsel on the other. It is idle to say that this was not a proceeding in reality against the appellants when the very existence of their agencies was put in jeopardy.

". . . The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest. For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society, are to serve the purposes for which they are created and

endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play."

Inland Steel Co. v. National Labor Relations Board, 109 P. (2d) 9, Cir. Ct. of Appeals, Seventh Circuit (1940).

"(8) CONSTITUTIONAL LAW.

"'Due Process' implies a tribunal both impartial and mentally competent to afford a hearing.

"(9) CONSTITUTIONAL LAW.

"The fact that a court's judgment may be justified on the merits does not obviate the requirement of a fair trial and recognition of such principle is essential in proceedings before administrative agencies.

"(8) That a trial by a biased judge is not in conformity with due process is sustained by the authorities. In Tumey v. Ohio, 273 U. S. 510, 535, 47 S. Ct. 437, 445, 71 L. ed. 749, 50 A. L. R. 1243, the court said: '. . . . No matter what the evidence was against him, he had the right to have an impartial judge.'

"'The Court in Jordan v. Mass., 225 U. S. 167, 176, 32 S. Ct. 651, 652, 56 L. Ed. 1038 said: 'Due process implies a tribunal both impartial and mentally competent to afford a hearing.'

"The principle is aptly stated in People v. Neimark, 154 App. Div. 760, 139 N. Y. S. 418, 420, where it is said: '. . . . The first idea in the administration of justice . . . is that a judge must necessarily

be free from all bias and partiality. He cannot be both judge and party, arbiter and advocate in the same cause. Mankind are so agreed in this principle that any departure from it shocks their common sense and sentiment of justice.'

"(9) And the fact that the court's judgment may be justified on the merits does not obviate the requirement of a fair trial. As was said in U. P. R. Co. v. Syas, S. Cir. 245 F. 561, at page 568: '. . . But no judgment is just if not obtained by due process of law; otherwise, courts could enter judgments without trial. . . .'

"The recognition of the principle is as essential in proceedings before administrative agencies as it is before courts. As was said in Ohio Bell Telephone Co. v. Public Ut. Comm., 301 U. S. 292, at page 304, 57 S. Ct. 724, at page 730, 81 L. ed. 1093: '. . . . Indeed much that they do within the realm of administrative discretion is exempt from supervision if these restraints have been obeyed. All the more insistent is the need, when power has been bestowed so freely, that the 'inexorably safeguard' (citing case) of a fair and open hearing be maintained in its integrity (citing cases) the right to such a hearing is one of the 'rudiments of fair play', (citing cases) assured to every litigant by the 14th Amendment as a minimal requirement. (Citing cases.) There can be no compromise on the effecting of convenience or expediency or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored."

The rule is again clearly stated in *Morgan v. U. S.*, 304 U. S. 1, 14, 58 S. Ct. 773, 999, 82 L. Ed. 1129.

National Labor Relations Board v. Phelps, et al., 136 F. (2d) 562 (1943), Circuit Court of Appeals, Fifth Circuit.

"1. CONSTITUTIONAL LAW.

"A fair trial by an unbiased and non partisan trier of facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a Court by a Judge. U. S. C. A. Const. Amend. 14.

"4. CONSTITUTIONAL LAW.

"Partiality by trier of facts particularly when unrelieved against though challenged, vitiates all subsequent proceedings, and no judgment based on them may stand." U. S. C. A. Const. Amend. 14.

"The Board does not, indeed, it could not, contest the correctness of the principle respondents invoke, for a fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge. Indeed, if there is any difference, the rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication where many of the safeguards shall have been thrown around court proceedings have, in the interest of expedition and supposed administrative efficiency been relaxed. Nor will the fact that an examination of the record show that there was evidence which would support the judg-

ment, at all save a trial from the charge of unfairness, for when the fault of bias and prejudice in a judge first rears its ugly head, its effect remains throughout the whole proceeding. Once partiality appears, and particularly when, though challenged, it is unrelieved against, it taints and vitiates all of the proceedings, and no judgment based upon them may stand."

Citing of further decisions along this line can be of little use. The facts speak for themselves. If in free America the judge to determine his own confiscation of a $26,000,000.00 association can properly announce to Congress under oath what his decision will be, before any trial, before any hearing and before the submission of any evidence, then the due process clause of the United States Constitution and the ideals of fair play and fair trial have indeed departed from this land.

Not only have appellants Fahey and Ammann set themselves up as the only tribunal to judge their own acts, but they have undertaken to deny to the officers and board of directors of the seized Association any power of recourse to any court.

By Regulation No. 207.3 the defendant Fahey, purporting to enact the laws of the United States, provided as follows:

"Such officers and directors or any of them shall not thereafter have, exercise, or act in connection with any such rights, powers or privileges or any asset or property of any nature of this Association: provided, however, that nothing herein shall deny to

such officers and directors the right from time to time to address such petitions authorized by the board of directors as they may have to the Federal Home Loan Bank administration or its representatives designated to receive such petitions concerning such Association or to represent the Association at hearings provided in these Rules and Regulations."

By Federal Home Loan Bank Order *Bulletin 54*, dated March 25, 1946 [R. 361-363], denying subpoena power of courts, defendant Fahey evidences his contempt for the authority of all United States courts unequalled except by his contempt for the authority of the Congress of the United States. He, Fahey, a supposed servant of the people, can by his sole order prevent the board of directors and officers of a confiscated Association from "taking any action except addressing petitions to the board," now Fahey. He can, by his sole edict, deny the subpoena process of all of the United States Courts. Under this Order you would expect his subordinates and himself to deny the subpoena power and process of this very Supreme Court of the United States. Small wonder that he thinks he can constitute himself a court and make his own laws. If he can deny the subpoenas of even the Supreme Court of the United States, he is indeed the dictator he thinks himself. If the constitutionality of these acts be upheld in this case by this Honorable Supreme Court, it, the Supreme Court of the United States, and all of the United States courts will exercise only such authority as the defendant Fahey chooses to give them by

his various regulations. If he can make a regulation preventing a board of directors and officers of a seized Association from doing anything except petition him and if he can deny the subpoena power of all United States courts, he can adopt a regulation that he himself is immune from the service of all Summons or process of Congressional Investigating Committees, United States courts, Presidential Orders, and all other Governmental and Constitutional authority of the United States of America. The issue in this case is not merely delegation of authority or even "delegation run riot." The issue is usurpation and dictatorship by an official, bureau or board not only of the powers of Congress and the powers of the courts but of the very Constitution of the United States itself. If this Section 5(d) be held constitutional, Fahey's contention that he is beyond the power of all courts will have been upheld. This appeal before this Honorable United States Supreme Court is either the first of many such appeals or the last. For if the act is constitutional, neither the shareholders whose savings are in the Association nor the home owners who have borrowed money from the Association nor the Association itself nor the officers or directors elected by the shareholders and depositors have any rights nor any property which Fahey need respect. Section 5(d) gives him authority to do as he pleases. Either the Constitution of the United States is the last barrier and prevents such authority being valid, or the Government of the United States has passed from the Congress and the Courts and the Executive into the hands of Fahey.

I-C.

Section 5-D Denies Due Process Because Tribunal Created by Implication Was Without Authority.

One of the essential elements of due process is the requirement that the tribunal conducting the hearing be a duly constituted tribunal with authority to enforce its orders.

The parent Federal Home Loan Bank Act and the Amendatory and Companion Home Owners Loan Corporation Act and particularly Section 5(d) of the last act contained no authority whatsoever to defendant Fahey to constitute himself as a court; to issue any process or to conduct any hearing; the absence of such authority becomes glaringly apparent when one considers the functions at such a hearing. The hearing is to determine *upon evidence* the infliction of the penalty, of dissolution, merger, or liquidation upon the association. At such a hearing it must be expected that all of the functions performed by a court will be necessary. Among the functions essential to the administration of justice and the elicitation of the truth, is that of compelling the attendance and the testimony of hostile and unwilling witnesses. Does Fahey pretend that at his hearing wherein he judges himself and his own acts, that he has the power to issue a subpoena on behalf of the Association, to compel the attendance of witnesses who would probably have vital evidence? If such witnesses should refuse to attend the hearing, does he arrogate to himself the power of punishing as a contempt of Fahey the refusal of a witness to attend the hearing? Or the refusal to testify as to matters the witness does not care to disclose? Assumption, implication and necessity may stretch language a tremendous distance, but surely it cannot supply completely missing essentials.

If the constitutionality of this be upheld, Fahey will have been authorized to create his own court, be his own judge, and jury, make his own rules of law and evidence of process and procedure, issue his own subpoenas in such form and with such penalties as he alone shall determine, and to decide the extent of his own jurisdiction. If he has by implication, the power of subpoena, he can compel the attendance of witnesses from the farthest corners of the United States. This power is denied even to our Federal courts. If a subpoena thus issued by Fahey is disobeyed will he send one of his deputies to arrest contumacious witnesses and decide upon his own method of punishment? Will he imprison the recalcitrant witnesses in Fahey's own prisons and institutions of correction? Or do none of these powers actually exist and may this process self issued and self designated be ignored? It is essential that the defendant have the protection of compelling reluctant witnesses to testify under oath. Such power of compulsion is given to no one by any of the acts of Congress here held unconstitutional. The other alternative is that the only due process is given by a tribunal self appointed by implication with no power to compel testimony, with no power to punish for contempt, with no power to enforce its orders; in truth and fact—no tribunal at all. But Fahey seeks to present an appeal to the courts from the action of this kind of a tribunal.

The importance of the duly constituted tribunal with proper powers of coercion becomes instantly apparent when one considers the defense to be made by the institution defending itself.

Could Fahey issue subpoenas to financial institutions to produce at the "Board Hearings" the evidence essential to determine the truth or falsity of the charges at issue

in the hearing? Or are Fahey's decisions to be made on the basis of whispers, innuendo, surmises, and guesses? As there is no power to compel attendance, no power to punish refusal to testify, no real evidence can be produced at the administrative hearing. If the tribunal has no power to take testimony it cannot administer an oath. Witnesses testifying falsely or refusing to testify run no risk of punishment and all of the bulwarks and protections built around judicial proceedings through the centuries of their development have completely disappeared.

The very statement of such conduct taxes the power of belief that any commissioner or officer of the United States could imagine that he had the power to do these acts. It is of course fundamental that a court must be created by law and that its jurisdiction or power is only that given it by law. The Supreme Court of the United States in the following case concerning a state court illustrates the principle:

> *Scott v. McNeal*, 154 U. S. 34, 38 L. Ed. 901, U. S. Supreme Court (1893).
>
> " . . . The 14th Article of Amendment of the Constitution of the United States, after other provisions which do not touch this case, ordains 'nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' These prohibitions extend to all acts of the state, whether through its legislative, its executive or its judicial authorities. *Ex parte Virginia ('Virginia v. Rives')*, 100 U. S. 313, 318, 319 (25:667, 668); *Ex parte Virginia*, 100 U. S. 339, 346 (25:676,

(79); *Neal v. Delaware*, 103 U. S. 370, 397 (26:567, 574). And the first one, as said by *Chief Justice Waite in United States v. Cruikshank*, 92 U. S. 542, 554 (23:588, 592), repeating the words of *Mr. Justice Johnson in Bank of Columbia v. Okely*, 17 U. S. ....., 4 Wheat. 233, 244 (4:559, 561), was intended 'to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.' . . ."

"The words 'due process of law,' when applied to judicial proceedings as was said by Mr. *Justice* Field speaking for the court, 'mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. *To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit*: AND if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or his voluntary appearance." (Emphasis added.)

Pennoyer v. Neff, 95 U. S. 714; 733 (24:565, 572).

As the Supreme Court said in the above case, "There must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit." There is no law for the creation of Fahey's court, excepting against the dictator's own regulations made by himself for himself. *Congress has never authorized Fahey's Administrative hearings or court.*

I-D.

Section 5-D Denies Due Process Because It Authorizes Merger Without Notice and Without Hearing.

The language of the act of Congress held unconstitutional is:

> "(d) The Board shall have full power to provide in the rules and regulations herein authorized for the reorganization, consolidation, merger, or liquidation of such association, including the power to appoint a conservator or a receiver, to take charge of the affairs of any such association and to require an equitable readjustment of the capital structure of the same; and to release any such association from such control and permit its further operation."

The mere reading of the language of the act irrefutably demonstrates that it is unconstitutional. Under the authority granted, the one man "board" could, without consent of either institution, merge a prosperous, solvent institution in Washington, D. C., with a bankrupt, closed institution in Nevada or Arizona. He could merge the assets of the Washington, D. C., institution into and with another institution 3000 miles or even 10,000 miles away. He could merge the assets built up by a lifetime of faithful fidelity and trust by the officers of one institution with the risks and liabilities created by another dissolute and improvident management.

Today you are a depositor of a prosperous multi-million dollar solvent association in Washington, D. C. Tomor-

row you pick up the newspaper and find that you are now a depositor in, and your money and assets are, in the control of an institution unknown to you and thousands of miles from your locality. The mere statement sounds fantastic but this case actually surpasses the statement.

The Federal Home Loan Bank of Los Angeles existed at Los Angeles, California, and had $43,000,000.00 in assets. The Federal Home Loan Bank of Portland existed in Portland, Oregon, 1146 miles away and on the morning of March 29, 1946, both ceased to exist and a new institution sprang into existence at San Francisco, California, about 500 miles from Los Angeles and about 743 miles from Portland, Oregon. The hundreds of shareholders at both institutions learned for the first time that their institutions ceased to exist; that they were involuntary stockholders in a new institution, hundreds of miles from the location of their old institutions, with totally unknown assets and liabilities, with an entirely different board of directors and officers, all without a vote being taken by any of the shareholders concerned, without an opportunity to withdraw or protest or even know what was being done to them or their assets until the acts were all completed. And this is said, by defendants Fahey and Ammann, to fully comply with the due process clause of the Constitution!

It is significant that the only case bearing any similarity to these facts which has been brought before the United States courts is that involving the acts of a military

governor in a conquered territory, during and immediately subsequent to a war. The case of

Ochoa v. Hernandez, 230 U. S. 139, 57 L. Ed. 1427, U. S. Supreme Court (1913).

". . . Constitutional law . . . due process of law . . . definition.

"6. The guaranty of due process of law inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, without notice and opportunity for a hearing.

. . . Without the guaranty of 'due process' the right of private property cannot be said to exist, in the sense in which it is known to our laws. The principle, known to the common law before Magna Charta, was embodied in that Charter (2 Coke, Inst. 45, 50), and has been recognized since the Revolution as among the safest foundations of our institutions. Whatever else may be uncertain about the definition of the term 'due process of law,' all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing."

In the foregoing case the property of one was to be given to another by an order of a military governor. In our case, the $40,000,000.00 of the Federal Home Loan Bank of Los Angeles was given to the Federal Home Loan Bank of Portland by a similar order, this time by

a so-called commissioner. The purpose of elaborating upon the Los Angeles Federal Home Loan Bank merger is because such a merger was fully intended to be the fate of the seized defendant Long Beach Federal Savings and Loan Association and was prevented only by the fact that on the day it was seized, runs of millions of dollars a day immediately occurred and before the runs had subsided, a restraining order preventing such mergers had been issued by the Federal District Court. One not familiar with the activities of these defendants Fahey and Ammann would hardly credit the necessity for restraining a merger until a hearing in the courts could be held, but the Federal Home Loan Bank of Los Angeles matter completely answers any doubts as to what these defendants would have done unless the courts prevented them. Significantly, the Supreme Court of the United States held this action void and said:

> "Whatever else may be uncertain about the definition of the term 'due process of law,' all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing."

The "protection" of the people's savings does not require such tyrannical dictatorship. Savings transferred by dictatorial fiat from one state to another thousands of miles from their place of deposit, involuntary assumption of unknown liabilities, complete change of officers and directors from those elected by the people whose assets

are thus dealt with is not protection, does not inspire confidence, and cannot be justified. Appellants, defendants Fahey and Ammann, profess great astonishment that a run of millions of dollars a day in withdrawals ensued immediately on their seizure of the Long Beach Federal Savings and Loan Association. The public had read of the one-day liquidation and dissolution of the Federal Home Loan Bank of Los Angeles and the transfer of its assets to San Francisco, some 500 miles away. Does anyone wonder that, upon reading that something similar was happening to the Long Beach Federal Savings and Loan Association they hurried to get their money out while it was still in their home town and before it also went thousands of miles to some new locality, under some new management, and was merged into unknown dangers?

The wonder is that even the 50% remained, and they did so only when the Federal courts at Los Angeles commenced drastic steps to curb such highhanded confiscation.

We do not deny that the Act of Congress attempts to confer all of these powers of merger upon Fahey but we do deny that under the Constitution of the United States any act of Congress can confer these arbitrary powers upon anyone.

As to the matters concerning merger, the defect is not that the act didn't give the power but that the Constitution of the United States prohibits the existence of such powers in free America.

II.

SECTION 5-D IS UNCONSTITUTIONAL BECAUSE IT ATTEMPTS TO DELEGATE WITHOUT RESTRICTION AUTHORITY TO ENACT THE LAWS OF THE UNITED STATES.

Section 5(d) of the H. O. L. C. Act of 1933 was supplementary to, and operative only in conjunction with, the Federal Home Loan Bank Act (c. 522, 47 Stat. 725, 12 U. S. C. 1424) which was the parent Act. All of Section 5 (Subsections a-k, inclusive), was meaningless, unless read in connection with Federal Home Loan Bank Act. Section 5 is an effort to provide for a scheme for the creation of Federal Savings and Loan Associations similar to State Bldg. and Loan Associations which had existed throughout the United States for many years. Another companion act is the act providing for insurance of savings and loan accounts. (National Housing Act (Act of June 27, 1934, c. 847) (Sec. 406, 48 Stat. 1246, 12 U. S. C. 1729) which provides in Section 406(a) and (b) a complete scheme for the liquidation of insured institutions. In Section 401(d) a definition of default with reference to an Association in default is given.

On the question of delegation of power to make the laws of the United States the question to be decided by this Honorable Supreme Court is whether or not the Congress can completely abdicate or whether it must enact the laws of the United States. An effort will be made in this brief to treat the question of denial of due process and improper delegation separately because the things done by the one man "board" in denying due process would have been unconstitutional even if done by the

express language of Congress itself. As to the question of any hearing, administrative, court, or otherwise, the Act is completely silenced.

Section 5(d) is unconstitutional for both reasons:

1. Improper delegation.
2. Failure to provide for due process.

As to improper delegation it is defective because the entire law enacting power is given to the board.

In considering the validity under the United States Constitution of Section 5-D of the Home Owners' Loan Corporation Act, it is well to have the language immediately in mind. It is:

> "5(d) The Board shall have full power to provide in the rules and regulations herein authorized for the reorganization, consolidation, merger, or liquidation of such associations, including the power to appoint a conservator of a receiver to take charge of the affairs of any such association, and to require an equitable readjustment of the capital structure of the same; and to release any such association from such control and permit its further operation."

Not only does this language completely fail to give due process of law by requiring notice and hearing either before or after the acts authorized but it completely fails to place any limitations upon the exercise of the powers conferred. No where in the entire act is the Board (now a one-man dictator) instructed as to why, when, where or how he is to re-organize or to consolidate or to merge or to liquidate, nor what shall be the causes for which he shall appoint a conservator or a receiver. The only

restrictions upon his authority are such as he chooses to put upon himself. Congress has placed none. Under the language of this statute, he could merge an association in Long Beach, California, completely solvent and with untold millions of assets, with another completely insolvent association in Florida or New York, and such action would be within his statutory power. He could reorganize an association with a surplus of millions of dollars and merge it into another association with its capital impaired and use the surplus from the solvent association to meet the deficit from the impaired association and the depositors in neither would have any voice whatever in the matter. He could, as he has, in the Long Beach Federal matter, appoint a conservator for a completely solvent prosperous and growing association and liquidate this solvent growing association for no motive other than his own personal spite. Unquestionably his power to liquidate is unrestricted. There is nothing in the act which would prevent him from liquidating this association which has grown from $7,500.00 to $26,000,000.00 in twelve years, just as there was nothing in the act which prevented him from seizing it and putting his conservator in charge. Perhaps, it is his intention to reorganize the association. After all, a growth from $7,500.00 to $26,000,000.00 probably indicated bad management. Perhaps the conservator who lost $6,000,000.00 the first week after he took over the association, is the type of management that Fahey thinks should be in charge of the association. *At least, it is the type of management he put in charge of the Long Beach Association.* Perhaps he desires to require "*an equitable* readjustment of the capital structure."

After all, the surplus is only $1,300,000.00. Dividends have been paid every year at rates ranging from 2½% to 4% and such a surplus and growth record seem to enrage the appellants. On few, if any, occasions has the Congress of the United States completely abdicated as it has in Section 5-D. One of these instances is the N. R. A. which involves the cases of:

Schechter Poultry Co. v. U. S., 295 U. S. 495, 79 L. Ed. 1570 (Decided May 27, 1935), U. S. Supreme Court.

In which the Court said:

"Congress cannot delegate legislative power to the president to exercise an unfettered discretion to make whatever laws he thinks may be advisable for the rehabilitation and expansion of trade or industry.

. . . This Court has held that delegation may be unlawful though the act to be performed is definite and single if the necessity, *time and occasion of performance have been left in the end to the discretion of the delegate*, . . . This is delegation running riot. No such plenitude of power is susceptible of transfer. The statute however aims at nothing less as one can learn both from its terms *and from the administrative practice under it.*" (Emphasis added.)

Panama Refining Co. v. Ryan, 293 U. S. 388, 79 L. Ed. 446 (Decided January 7, 1935) U. S. Supreme Court.

The Court said:

"The Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus invested.

Thus in every case in which the question has been raised the Court has recognized that there are limits

of delegation which there is no constitutional authority to transcend. We think that 9-C goes beyond those limits as to the transportation of all production in excess of state permission. *The Congress had declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited.*

If 9-C were held valid it would be idle to pretend that anything would be left of limitations upon the power of Congress to delegate the law making function" (Emphasis added.)

The above language applied even more strongly to Section 5-D than it would to the delegation contained in the N. R. A. Act. Certainly the "necessity, time and occasion of performance" of the merger liquidation, appointment of conservator or receiver are nowhere in the Home Owners Loan Corporation Act defined by the Congress. The regulations adopted by the "Board" are not mere details. They are the very life and essence of the law itself. The Congress can not delegate to anyone (neither a five man board, nor the one man Fahey), the determination of when, why, how and for what reasons an association should be reorganized or consolidated or merged or liquidated, nor particularly why, and under what conditions a conservator or receiver should be appointed. The point is not that Congress can not, with proper safeguards, set up a system to do any or all of these things, but that Congress can not abdicate and let either a five man board or the one man Fahey pass the laws of the United States. The Assistant United States Attorney made valiant efforts to find somewhere in the Act the limitations necessary to its validity and finally said [R. 669], "We will

have to look at Section 5-D again. I cannot stretch it any further than it goes." It is interesting to watch the development of Fahey (acting as Congress) amending the laws of the United States; at one time, providing for notice to the shareholder members ten days before Fahey's Court grants a hearing and a few months later by an amendment deciding that no such notice is necessary; at one time legislating that no conservator should be appointed without notice and again a few months later deciding that such notice is unnecessary. But the most interesting legislation of all is the order granting (as a favor and condescension and not by any matter of right), a "hearing." Each order for each hearing decides what evidence will be accepted or rejected and what powers the "hearing officer" shall have. At one hearing interested parties may "petition" for leave to be heard. Apparently, at another, the commissioner might decide to hear only himself. This comment on the regulations is made in view of the language of the Supreme Court that the aim of a statute may be learned "both from its terms and from the administrative practice under it." (From *Schechter Poultry Co. v. U. S.*)

The all prevailing defect which renders unconstitutional every action under Section 5(d) is complete absence of any restrictions whatever upon the powers given. For example:

So far as anything in the Act is concerned, appellant Fahey (the board) has "full power to provide . . ." for the reorganization of a solvent, as well as insolvent, growing as well as shrinking, well managed as well as badly managed Associations throughout the United States.

Under this power he could order an Association to have one or many classes of deposits, one or many classes of voting privileges, one or many classes of obligations to its creditors; he could require it to exist as a corporation, an Association, a partnership, an individual, or any other status which might occur to him. He could require that the officers and directors be appointed by himself with no voice by those whose money and property is to be thus governed. In short he has greater power than the Congress of the United States and the legislatures of the 48 states combined. All of the salutory bankruptcy provisions of Section 77B vested in the District Courts to be exercised only after notice to the creditors and stockholders, and hearing by the bankruptcy courts, are completely vested in the one man "board" upon such conditions as he himself shall make. Under Section 5(d) he could consolidate or merge exactly as he could re-organize; he could if he wished provide that there should be but one Federal Savings and Loan Association in the entire United States with branches in all of the cities and counties of the 48 states. And he could provide that depositors in Florida should receive 1%, and those in Massasetts 10%. He could provide that deposits might be accepted throughout the United States, but withdrawals made only at Washington, D. C. What he has already done is no more fantastic than what has been here outlined.

He has liquidated, re-organized, merged and consolidated the Federal Home Loan Bank of Los Angeles and its $46,000,000 in assets into and with the Federal Home Loan Bank of Portland, Oregon and San Francisco, California, all in one day by a summary order without

hearing, without notice, without trial, and he has attempted to preclude the recourse to the courts by any of the banks or stockholders involved. The question at this stage is not, "Does this language give him that power." This, of course, must be answered, "Yes," but the question before this Honorable Supreme Court is, "Can Congress under the Constitution of the United States delegate these powers to any one?" The power to appoint a receiver or conservator or to liquidate or merge a solvent, prosperous, growing, financial institution merely at the pleasure and whim of the "board" is completely repugnant to the Constitution of the United States. The need for supervision and regulation of financial institutions in connection with the protection of the peoples' savings on one hand does not justify the creation of a destructive dictatorship imperilling the same savings in its rule or ruin policy of domination of the management of such institutions.

A solvent, growing, prosperous, liquid association is not subject to the remedies properly applied to the insolvent, mismanaged, decaying institution. Further, the powers conceded as necessary against an insolvent association are yet subject to the restrictions of due process and proper delegation. Congress itself would never have enacted any authority permitting seizure and confiscation of solvent institutions without cause, without hearing, without notice and without trial. The regulations (purportedly laws of the United States) enacted by appellant Fahey and his conduct under them, in the confiscation of the Los Angeles Bank and the attack upon the Long Beach Association demonstrates the need for the salutory rules of division of power, set up by the founders of free

America in the constitutional division between the legislative, the executive and the judicial. The division is deliberate and the fruit of the bitter experience of oppression under George III. There is little temptation for the legislative law making authority to enact excess powers in favor of the executive. There is tremendous temptation for the executive power if permitted to enact its own legislation to usurp to itself powers which it would not even remotely contemplate giving to another branch.

There is little temptation for the legislative branch through Congress to deprive the judicial branch of its power of review in favor of centralizing dangerous, autocratic authority in the executive, but there is grave danger of the executive (if given unlimited and unrestricted legislative power), denying the judicial branch of the Government all power of review and even eventually dissolving the legislative branch and denying to it even the power of repeal.

Division of power into the legislative and judicial and the executive undoubtedly is inconvenient, but the only other alternative is progressive encroachment and eventual dictatorship. As is exemplified in this case, the coupling of the executive and the legislative speedily leads to enactment by the usurping, expanding dictatorship of laws denying the judicial power as is exemplified in Federal Home Loan Bank Administrative Order Bulletin #54 [R. 361] (denying the power of U. S. Court Subpoenas) and Section 207.3 of Regulations (denying the board of directors power to do anything except petition appellants) together with the entire attitude of appellants Fahey and Ammann with their dilatory and evasive attacks upon the jurisdiction and technical proce-

dural matters throughout this case. The decision of this action will be one of the major monuments in the history of constitutional government. If Congress may under the United States Constitution simply provide an executive agency with complete powers to legislate, our traditional freedom has disappeared. Flexibility will have been obtained it is true, but at the price of freedom. It is not necessary to pay this price in order to properly protect the savings of the people. An administrative agency knowing that its actions are subject to immediate scrutiny by an impartial, unbiased Federal Court would never have dared attempt the confiscation of the Federal Home Loan Bank of Los Angeles merger and liquidation, nor would it have even contemplated the summary seizure of the solvent Long Beach Association. One safe behind the walls of constitutional guarantees completely upheld by an impartial independent, Federal judiciary little appreciates the protection he is receiving. It is only when the legislative branch becomes careless, sometimes under the pressure of a great depression, or under the compelling necessity of a world war and relaxes its vigilance and permits its powers to be usurped by the executive branch (whose nature is always to expand and always to encroach) that examples such as the Los Angeles Bank and the Long Beach Federal occur. These shocking, arbitrary acts of despotism bring into sharp focus the dangers against which our founding fathers provided in their division of governmental powers.

Assume for a moment that this Honorable Supreme Court should uphold 5(d) as constitutional, THIS WOULD BE THE LAST CASE TO COME BEFORE THIS OR ANY OTHER COURT INVOLVING FEDERAL HOME LOAN BANKS OR FED-

ERAL SAVINGS AND LOAN ASSOCIATIONS. The power of subpoena of the United States and other courts has already been denied by Federal Home Loan Bank Administrative Order Bulletin 54 [R. 361] *supra*. The right of the board of directors to make any appeal to the courts has already been denied by Regulation #207.3. All that remains is for the dictator to further utilize his then confirmed powers of legislation and enact that Congress itself cannot repeal his laws. It is interesting to observe how "flexible" has become the "procedure" under this unconstitutional delegation of legislative power. The dictator decides whether or not he will grant (as a favor) any hearing at all. At such decision he decides where the hearing is to be held. He appoints a different judge, himself or his subordinates, for each case. He makes his rules of evidence differently for each case. If he chooses, he may in one case grant the interested parties the right to "petition" for leave to be heard and in another he may deny hearing to one or grant it to another. He may accept one type of evidence from one party and reject the same evidence from another. He may waive all requirements of oath or affirmation, all privileges of cross-examination. In short his powers exceed those of an unlimited, absolute monarch. Congress itself under the "equal protection of the laws" clause of the Constitution could not do the things appellants Fahey has undertaken to do under the guise of regulations.

In Appendix "C" of Appellants' Brief, they have set forth the provisions of the laws of the State of New York, Massachusetts, California, Indiana, Ohio, New Jersey and Kentucky asserting on page 72 of their brief "The Administration has actually followed these state

rules very closely, as a comparison of Section 206.1 of its Regulations (*infra*, pp. 111-112) with the foregoing resume makes clear . . . In their entirety, the Bank Administration's list conforms very closely to the provisions of at least the New York, California, Indiana, and Massachusetts statutes." OMITTING ENTIRELY BOTH IN THEIR ARGUMENT AND IN THEIR APPENDIX PROVISIONS OF THESE SAME STATE LAWS PROVIDING FOR IMMEDIATE JUDICIAL REVIEW OF SUCH APPOINTMENTS. We have undertaken in Appendix "A" of this brief to set forth the omitted portions of the state acts, sharply curbing the apparently unrestrained power which appellants would have this Court believe those state acts conferred.

The attempt to confer upon governmental officers the untrammelled and absolute power to grant or deny, at their whim, the right of a business to exist, has been discussed by the Supreme Court of the United States in the following case:

> *Yick v. Hopkins*, 118 U. S. 356, 30 L. Ed. 227, U. S. Supreme Court (1886).
>
> "4. The order of the City and County of San Francisco, providing that it should be unlawful for any person to engage in the laundry business within the corporate limits 'without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone,' does not prescribe a rule and conditions for the regulation of the use of laundry property to which all similarly situated may conform; but it confers a naked arbitrary power upon the board to give or withhold consent, and makes all engaged in the business the tenants at will as to their means of living, under the board of supervisors . . .

"The ordinance drawn in question in the present case is of a very different character. It does not prescribe a rule and conditions for the regulation of the use of property for laundry purposes, to which all similarly situated may conform. It allows without restriction the use for such purposes of buildings of brick or stone; but, as to wooden buildings, constituting nearly all those in previous use, it divides the owners or occupiers into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld, at their mere will and pleasure. And both classes are alike only in this: that they are tenants at will, under the supervisors, of their means of living . . .

". . . When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power . . . For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails as being the essence of slavery itself. . . .

". . . It lays down no rules by which its impartial execution can be secured or partiality and oppression prevented. It is clear that giving and enforcing these notices may, and quite likely will, bring ruin to the business of those against whom they

are directed, while others, from whom they are withheld, may be actually benefited by what is thus done to their neighbors; and, when we remember that *this action or non-action may proceed from enmity or prejudice, from partisan zeal or animosity, from favoritism and other improper influences and motives easy of concealment and difficult to be detected and exposed,* it becomes unnecessary to suggest or comment upon the injustice capable of being wrought under cover of such a power, for that becomes apparent to every one who gives to the subject a moment's consideration. In fact, an ordinance which clothes a single individual with such power hardly falls within the domain of law, and we are constrained to pronounce it inoperative and void.

"This conclusion, and the reasoning on which it is based, are deductions from the fact of the ordinance, as to its necessary tendency and ultimate actual operation. In the present cases, we are not obliged to reason from the probable to the actual and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinance in actual operation, and the facts shown establish an administration, directed so exclusively against a particular class of persons as to warrant and require the conclusion that whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States."

The above language of the Supreme Court of the United States aptly, and pungently applies to the situation of commissioner Fahey seizing and confiscating without notice, without hearing, and with no reason except his own displeasure, banks and savings and loan associations with millions upon millions of dollars of assets and thousands upon thousands of members and depositors. As the Supreme Court said "for the very idea that one man may be compelled to hold his life or the means of living or any material right essential to the enjoyment of life at the mere will of another seems to be intolerable in any country where freedom prevails as being the essence of slavery itself."

In the *Yick Wo* case, the United States Supreme Court was considering the rights of the humble Chinese laundryman to wash the clothing of the citizens of his adopted country. Aliens and strangers were being protected against the hatred and malice of a board of supervisors. In our case, the savings of the humble (the average deposit is $1400.00), the homes of the working man (the average loan on the average home is $1500) have been made the objects of the malice and spite of those seeking to punish resistance to their complete dictatorial dominion. The cause is too grave to be answered by the "abuse of power" doctrine. If such power is allowed to exist, it will be abused. The denial of power as to solvent institutions and the requirement of due process as to even insolvent institutions is the only protection possible against a repetition upon an enormously enlarged scale of the Los Angeles Bank and the Long Beach Association confiscations. The very Congress itself, claimed by appellants Fahey and Ammann to be the source of these powers, has through its Congressional Investigating

Committee denied their existence in the following language [page 27 of Report of Select Committee to Investigate Executive Agencies, Exhibit D, Mallonee Affidavit, U. S. Supreme Court in Application to Vacate Stay]: "Your Committee questions whether the law ever contemplated that the board should have the extraordinary power to seize and appoint a conservator for a solvent institution as a part of the supervisory functions entrusted to the board over member banks."

The chronology of events leading to the two seizures is most interesting. Page 1 of the Congressional Investigating Committee's Report, *supra*, sets forth that the first complaint concerning appellant Fahey was made to the Committee on March 1, 1946. That on March 15, 1946 appellant Fahey through his examiner Thurston received a copy of a resolution adopted by the board of directors of the Federal Home Loan Bank of Los Angeles appropriating money for expenses and for counsel fees for the hearing to be held before the Congressional Investigating Committee.

That such resolution was received on March 18, 1946 in Washington, D. C., on March 25, 1946, one week after receipt of knowledge that the Federal Home Loan Bank of Los Angeles was appropriating funds for counsel for action before the Congressional Investigating Committee, appellant Fahey, the one man "board," enacted Bulletin 54 amending Section 7.3 denying the powers of subpoena of all courts, including the courts of the United States, and four days later, the Federal Home Loan Bank of Los Angeles was summarily liquidated and dissolved.

On May 8, 1946 the board of directors of the Long Beach Federal Savings and Loan Association made an

appropriation to defend the Association against the fate which had overtaken the Los Angeles Bank. On May 20, the conservator was appointed by the appellant Fahey for the Long Beach Federal Savings and Loan Association. The terroristic tactics against the Los Angeles Bank had not silenced the protests and it was necessary to repeat them against the Long Beach Association.

The Los Angeles Bank lived but two weeks after it appropriated funds for counsel to present its complaints to the Congressional Investigating Committee. The Long Beach Association lived but twelve days after it adopted a resolution appropriating funds for counsel to protect it, the association, from Fahey's destruction. The example to be observed by all other subjects of Fahey's dominion (The Federal Savings and Loan Associations throughout the United States) is plain, if you appropriate money to appeal to the courts or to Congress for protection, you will be liquidated the instant that appropriation is discovered.

Like the Boston Tea Party, the acts of terror stiffened the resistance of the oppressed rather than compelling obedience. On June 12, 1946, the Congressional Investigating Committee commenced its hearings. On July 15, 1946, the three judge statutory court at Los Angeles conducted its hearing. The remaining all important date yet to be filled in is the date of the opinion by this Honorable United States Supreme Court. Will the decision travel the road of freedom and upholding of the protection of the Constitution? Or will it travel the road of the dictators and uphold the power of a servant of the people to deny to the people the access to the courts for redress of wrongs a servant has committed against them?

III.

THE DISTRICT COURT, WHETHER ONE JUDGE OR THREE JUDGES, HAD JURISDICTION IN REM OF THE $26,000,000 IN ASSETS.

III-A.

The District Court Had Jurisdiction Under Title 28, Section 118, U. S. C.

Defendants Fahey and Ammann instead of meeting the issues squarely presented them by the complaint of plaintiffs and the cross-claim of the Long Beach Federal Savings and Loan Association chose to try to avoid these unpleasant issues by an attack upon the jurisdiction either the one judge or the three judge district courts of Los Angeles, California. Basis for such attack is difficult to comprehend. The defendant Ammann physically within boundaries of the court, served with process therein, and physically in possession of $26,000,000 in assets seized by him within the boundaries of the court of which assets be still in possession, and still within the boundaries of this court, vehemently contends that despite all these facts the court has no jurisdiction of him, Ammann; and the defendant Fahey is even more insistent that the court has no jurisdiction over either his cohort Ammann or himself, Fahey. Fahey was served with process but not within the boundaries of the court, however the $26,000,000 in assets were subject, both at the time of the commencement of action and at the time of enforcement of the judgment, to the power of the court. The nature of these assets is set forth in detail in the cross-claim of the defendant Long Beach Federal Savings and Loan Association. [R. 197.]

These allegations are undenied and of course, are undeniable. Briefly, the nature of the assets was, first: The real property (premises of the association) physically situated in the City of Long Beach, County of Los Angeles, State of California. Second, approximately $10,000,000 of United States Government bonds owned by the association and all physically situated within the County of Los Angeles, and State of California, some in the premises of the association, millions more in the custody of various banks, all in the County of Los Angeles, State of California. Third, approximately $12,000,000 consisting of approximately 8000 notes PAYABLE AT THE OFFICES OF THE ASSOCIATION, IN THE CITY OF LONG BEACH, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, executed by makers and borrowers, all residents of the County of Los Angeles, State of California, secured by deeds of trust conveying real property all physically located within the County of Los Angeles, State of California to a trustee under said deeds of trust whose principal place of business and place of organization was within the County of Los Angeles, State of California. [R. 197.]

The physical evidence of these assets, the pieces of paper such as notes, deeds of trust, Government bonds, and other security were also within the County of Los Angeles, State of California at the time of such seizure, the time of the commencement of the action, and, unless wrongfully removed by these defendants Fahey and Ammann are still within said County of Los Angeles, State of California.

The action as disclosed by the plaintiffs' complaint and the Long Beach Federal Savings and Loan Association's

cross-claim is a proceeding *in rem* to recover the physical possession of these purely local assets from the possession of defendants who are alleged to have wrongfully trespassed upon, and seized possession of, them. The action as shown by the complaint and the cross-claim also seeks the determination of the title to the seized assets as either belonging to Fahey and Ammann, or to the association and its shareholders, and also seeks the removal of the clouds, the encumbrances and liens upon the title to such assets caused by the unconstitutional order appointing Ammann as conservator and his wrongful seizure of their possession purportedly under said order. The real contention of the defendants Fahey and Ammann is of course that they are beyond the reach of all courts. They have not indicated any court in which they think they could be sued. But there is only one other possible court, which would be the District Court of Washington, D. C. Assume for an instant this action had been brought there. What would the District Courts of Washington, D. C., do to effect a title to 8000 homes in Los Angeles County? Security for 8000 notes and deeds of trust payable at the home office of the Association in Long Beach, County of Los Angeles, State of California? Ammann in possession of all this property and in addition in possession of the $10,000,000 in government bonds is clearly beyond the reach of the Washington, D. C. courts. Process served on him in a personal action (which is the only act which could be filed in Washington, D. C.) cannot reach 3000 miles to Long Beach, California. Fahey, if he happened to be found in the District of Columbia, might be served there, but what effect would this have on the $26,000,000 in Long Beach, California, in the hands of Ammann? The jurisdiction *in rem* to determine title to

and possession of, these assets, if not in Los Angeles County, California, can rest nowhere.

Fahey and Ammann claim to exercise this power (unconstitutionally given to them by the void act of Congress) to confiscate, merge, and interfere with, the homes and savings of all individuals unfortunate enough to be connected with Federal Savings and Loan Associations throughout the states. Must the citizens from Maine to California, from Florida to the State of Washington all suffer these invasions at the will of Fahey thousands of miles away in Washington, D. C., and be completely without recourse to the local Federal courts vested with jurisdiction under Title 28, Section 41, Subd. 26 and also Section 118, U. S. C.?

The decisions in the following cases fully sustain jurisdiction of the District Court in this, the Long Beach Federal Savings and Loan Association case.

A case exactly in point is:

> *Commonwealth Trust Co. v. Reconstruction Finance Corp.*, 28 Fed. Supp. 586, District Court, W. D. Pennsylvania, 1939.

We quote from the opinion:

> "(1-3) We shall first consider the objection made to the jurisdiction of this court. Defendant contends that as a corporation under the laws of the United States, all of whose capital is owned by the United States, and whose principal office is located in the District of Columbia, it is not suable in this District. These facts appear in the statute creating this corporation. See 15 U. S. C. A. Secs. 601, 602.

The General venue statute of the District Court is set forth in 28 U. S. C. A. Sec. 112. This statute provides: ". . . and except as provided in sections 113 to 118 of this title, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant. . . ."

Of the exceptions noted in this statute, the only one, pertinent to the present case is 28 U. S. C. A. Sec. 116, which confers venue of a local action upon the court within whose district property is located which is sought to be recovered. In our opinion, the facts pleaded would bring this action within the statute. The plaintiff is trustee of the bankrupt estate of the Colonial Iron Company now being administered in this court. Through the custody of its agent in this District, the defendant is in possession of 4,896.38 tons of pig iron located on land in this District leased to defendant by the Colonial Iron Company. The complaint alleges that the pig iron was transferred to defendant by the Colonial Iron Company, while insolvent, under a secret pledge agreement, as security for a debt contracted at the time the pledge agreement was entered into; that this transfer was fraudulent and void, being intended to give defendant a preference over other creditors of the Colonial Iron Company; that the attempted pledge by the Colonial Iron Company of its future output of pig iron was unauthorized by the laws of Pennsylvania; that the pig iron now in controversy in this suit was not in existence at the time the pledge

agreement was made, but was all manufactured subsequent thereto, and is a part of the assets of the bankrupt's estate to which the plaintiff is entitled; that proofs of claim have been filed in the bankruptcy proceeding by creditors whose claims arose subsequently to the date of the execution of the pledge agreement, but prior to the date of the transfer of the pig iron in question to the defendant.

Therefore these facts make plain that the action is local in its nature, and is for the recovery of specific personal property located in this district. True, the complaint does not say in so many words that plaintiff has made demand on defendant for delivery of this pig iron to plaintiff, and over the defendant refused to deliver; but this suit is certainly a demand and the defendant by its defense is certainly resisting the demand.

These facts pleaded, assuming that they are true presents a case entitling plaintiff to relief, *i. e.*, the return to the plaintiff of the pig iron, or its value.

The defendant contends that this action cannot be considered as a local action for the recovery of personal property because the plaintiff has not proceeded by the appropriate action of replevin. This position is no longer tenable under the new Rules of Civil Procedure, by which a party may sue on all claims 'either legal or equitable or both as he may have against an opposing party' and subject to the proviso that 'the court shall grant relief . . . only in accordance with the relative substantive rights of the parties.' See Rule 18. Then, too, under Rule 64 either at the time of the commencement of, or during the course of an action, all remedies provided by state laws for the seizure of property are available. Among the remedies thus available are replevin,

which may be proceeded with regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action.' Therefore, it is of no importance at the present time to consider whether the plaintiff's remedy is by replevin, to cover money had and received, or trespass. The real question is whether, under the facts disclosed in the complaint, the plaintiff is entitled to relief. If he is the court can apply the proper remedy, for Rule 54 (c) provides: '. . . Except as to a party against whom a judgment is entered by default every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

The property involved in this law-suit is located in this District. It is in the possession of the defendant through its authorized agent. The plaintiff claims he is entitled to this property. We therefore hold the defendant is suable in this District in an action to recover it. If we find the plaintiff is entitled to it, we may then apply the proper remedy as authorized by the new Federal Rules of Civil Procedure. (4) As to the other ground of dismissal, *i. e.*, that the complaint fails to state a claim on which relief can be granted, it is without merit. As we have already stated the complaint states the defendant is in possession of pig iron to which the plaintiff is entitled. It also sets forth the claim of title, which the defendant asserts and avers is fraudulent and void as against the plaintiff.

Assuming all this to be true, the complaint presents a claim on which relief may be granted. We shall not at this time enter into a discussion as to the merits of the plaintiff's claim, believing the de-

fendant may desire to answer the complaint on the merits. We can then pass on the entire controversy. An order may be submitted denying defendant's motion to dismiss, and allowing defendant ten days in which to file an answer to the complaint."

Another case in point is:

Omaha Nat. Bank of Omaha, Neb. v. Federal Reserve Bank of Kansas City, Mo., et al., 26 F. (2d) 884, Circuit Court of Appeals, Eight Circuit, 1928.

We quote:

"(1) This suit was brought under section 118, titl. 27, U. S. C. A. (Judicial Code paragraph 57), by the Omaha National Bank of Omaha, Nebraska, against Federal Reserve Bank of Kansas City, Missouri, Wyoming National Bank of Casper, Wyoming, First National Bank of Cheyenne, Wyoming, and T. E. McClintock, receiver of the First National Bank of Cheyenne, Wyoming, and was dismissed on the ground that the court was without jurisdiction. That section deals with local actions or suits, and there are two indispensable requirements to give the court jurisdiction: (1) The complaint must show that the subject-matter, the res, is within the territorial jurisdiction of the court, and (2) there must be diverse citizenship and residence between the plaintiff and all defendants who are necessary parties; and it does not matter that plaintiff is or is not a citizen and resident of the State in which the suit is brought. Its purpose is to enable him to obtain a judgment or decree that will bind the res, though the defendants are all nonresidents and cannot be personally bound un-

less they enter general appearance or should be served within the district. . . .

The allegations of the bill of complaint in reference to the property involved, its situs, and the basic of plaintiff's equitable claim thereto are in substance as follows: Plaintiff sues to enforce an equitable title and claim to a credit or funds on deposit in the Omaha Branch at Omaha, Nebraska, of Federal Reserve Bank of Kansas City, Missouri; about July 7, 1924, plaintiff received through the mail from the First National Bank of Cheyenne two drafts each for the sum of $50,000.00, drawn by said Bank of Cheyenne, on the First National Bank of Boston, Mass., for deposit to the credit of the drawer, subject, however, to final payment; thereafter on that day, and after banking hours, plaintiff received a telegraphic dispatch from said Bank of Cheyenne requesting that plaintiff transfer the sum of $60,000, from the credit created by said two unpaid drafts to the credit of Wyoming National Bank of Casper in the Federal Reserve Bank of Kansas City, Missouri, Omaha Branch; on the opening of said Federal Reserve Bank, Omaha Branch, on the next day, July 8, 1924, plaintiff pursuant to said telegraphic request caused the sum of $60,000 to be debited by said Federal Reserve Bank to plaintiff's account and a like sum credited in said bank to the said Wyoming National Bank of Casper, and said sum of $60,000 so transferred now stands as a credit on the books of defendant Federal Reserve Bank as a deposit and credit in favor of said Wyoming National Bank and is a charge and debit to the account of plaintiff; . . .

(5) Impliedly conceding, for sake of argument, all that has been said, it is contended that the facts pleaded show only a paper transaction, which did

not create or bring under the court's jurisdiction any personal property within the meaning of section 118, that the section contemplates some specific tangible thing; that here no money passed, no particular fund was created, only book entries were made at plaintiff's direction in the Omaha Branch Bank, and there is no res in the State and district of Nebraska which can be adjudged upon and disposed of by the court. It would be hard to convince men who devote their time to business and financial transactions that there is any merit in the contention. As proof to the contrary, and as a matter of common knowledge, the $60,000 will be handed over at the Branch bank's counter on proper orders to him who is entitled to it. In every practical and business sense the $60,000 is there, and it is a sacrifice of substance to form to say it is not. For remedial purposes on plaintiff's bill we think the situs of any property interest in the transferred deposit was at Omaha. In C. R. I. & P. Ry. Co. v. Sturm, 174 U. S. 710, 19 S. Ct. 797, 43 L. Ed. 1144, it was held for purposes of levy by garnishment that the situs of a debt was with the debtor. The court said:

> 'This is a legal necessity, and considerations of situs are somewhat artificial. If not artificial, whatever of substance there is must be with the debitor. He and he only has something in his hands. That something is the res, and gives character to the action as one in the nature of a proceeding in rem. . . . Of course, the debt is the property of the creditor, and because it is, the law seeks to subject it, as it does other

property, to the payment of his creditors. If it can be done in any other way than by process against and jurisdiction of his debtor, that way does not occur to us.'

The same proposition is learnedly discussed and a like conclusion reached in McBee v. Purcell Nat. Bank, 1 Ind. T. 288, 37 S. W. 53. Corporate shares represent the owner's right to a pro rata interest in corporate assets that may never be parceled among shareholders. The right as property, though intangible, is real, and is personal property within the purpose and meaning of this section, Jellenik v. Huron Copper Mining Co., 177 U. S. 1, 20 S. Ct. 559, 44 L. Ed. 647. It was there said, on the contention that the statutes had reference only to tangible personal property; 'This would be too narrow an interpretation of the statute.' See also Citizens' Sav. & Tr. Co. v. Ill. Cent. R. R. Co., 205 U. S. 46, 27 S. Ct. 425, 51 L. Ed. 703; Franz v. Ruder (C. C. A.) 11 F. (2d) 854; Norris v. Lohman (C. C. A.), 16 F. (2d) 355. In Goodman v. Niblack, 108 U. S. 556, 26 L. Ed. 229, an assignment was made by a debtor of all of his property for the benefit of his creditors. The assigner had a half-interest in a contract which proved to be profitable, and after his death his share was paid to his administrator, Niblack. Goodman, a judgment creditor of the assignor, the sued Niblack, pursuant to the terms of this section as it stood prior to the amendment of March 3, 1875, seeking to follow the money paid to Niblack as a trust fund out of which his judgment should be satisfied. In holding that the suit was maintainable Mr. Justice Miller, speaking for the court, said of this section:

'This is a proceeding in equity to enforce a lien on the fund which is within reach of the

court, and as the trustee and complainant have the requisite citizenship, section 738 of the Revised Statutes (28 U. S. C. A. paragraph 118) provides a remedy for inability to serve process by an order of publication. If they appear, the suit will proceed as usual. If they do not appear, the decree, so far as it affects the fund in the hands of Niblack, will bind them; and this is all that is necessary to give the court jurisdiction to grant relief prayed for by the complainant . . .'

. . . Accepting the allegations as stating the true facts, we think the $60,000 transferred to the credit of Wyoming National Bank in the Omaha Branch Bank was personal property within the court's jurisdiction, to which plaintiff asserted an equitable claim and title, and in that respect the suit was one properly brought under section 118 U. S. C. A. . . .

. . . We think the pleadings clearly show diverse citizenship between plaintiff and all defendants. In respect to parties also the bill stated a case within the requirements of section 118. Stockyards National Bank v. Bragg *et al.* (C. C. A.), 293 F. 879."

This case expressly holds that a debt, that is a bank deposit, is properly situated at the place of residence of the debtor. The uncontradicted allegations of the plaintiff's Complaint and the Cross-Claim of defendant, Long Beach Federal, show the existence of $12,000,000.00 worth of such debts, that is, promissory notes made by residents of the County of Los Angeles, payable at the office of the Association in Long Beach, Los Angeles County, California, secured by the conveyance of the legal title to 8,000 separate parcels of real property, situated in the

County of Los Angeles, State of California, and all of which notes, deed of trust and real property are physically within the jurisdiction of this Honorable Court. To claim that such an action is not local is fantastic.

Defendants Fahey and Ammann claim that they have not "cast a cloud" upon any title, but it would be very difficult to so convince the Home Investment Co., intervenor in this action, who has been struggling for weeks to clear the title to several million dollars' worth of property owned by it, upon which $800,000.00 worth of deeds of trust in favor of Long Beach Federal were seized by the defendants Fahey and Ammann. The court need but refer to the record on this subject (intervention of Home Investment Co.) [R. 247] for proof of whether or not the $12,000,000.00 worth of deeds of trust and the titles conveyed by them are clouded, encumbered or impaired.

Other cases dealing with the situs of property as being where a debtor resides or where the owner of said property is domiciled and the application of Section 118, are:

McQuillan v. National Cash Register Co., 12 F. (2d) 877;

Jellenik v. Huron Copper Mining Co., 177 U. S. 1, 44 L. Ed. 647;

Spellman v. Sullivan, 43 F. (2d) 762 (Dist. Court N. Y., 1930);

Bede Steam Shipping Co., etc. v. N. Y. Trust Co., 54 F. (2d) 658 (D. C. N. Y., 1931).

In view of the liberalized proceedings under the new Federal Rules of Civil Procedure and the statement contained in the case of:

Commonwealth v. Reconstruction Finance Co., 228 Fed. Supp. 586 (quoted at length, *supra*):

> "Therefore it is of no importance at the present time to consider whether the plaintiffs' remedy is by replevin, trover, money had and received or trespass. THE REAL QUESTION IS WHETHER UNDER THE FACTS DISCLOSED IN THE COMPLAINT, THIS PLAINTIFF IS ENTITLED TO RELIEF. If he is the Court can apply the proper remedy. For rule 54-c provides . . . every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." (Emphasis added.)

Clearly the defendant Long Beach Federal, under its Cross-Claim, is entitled to the return of its $26,000,000.00 worth of property. Plaintiffs as members of said Association are entitled to the same relief and the Court within whose jurisdiction said property is situated can grant such relief.

Section 118 is to be liberally construed so that a Court having jurisdiction of the *res* may, in an action *in rem*, acquire jurisdiction of absent defendants, so as to proceed against the property physically within the power of the Court. It is to be liberally construed as is held by the case of

Consolidated Interstate Callahan Mining Co. v. Callahan Mining Co., et al., 228 Fed. Supp. 528, District Court, D. Idaho, N. D., 1915.

". . . (2) Turning now to the real question, does the issue between the plaintiff and the defendant company involve a 'claim' to real or personal property, within the meaning of the statutory provision quoted? It will be borne in mind that the primary purpose of the statute was to enable federal courts to acquire jurisdiction of the persons of nonresident parties whose presence might be necessary to an adjudication of local actions touching the statute of property within the district, in cases depending for federal jurisdiction upon diversity of citizenship. By implication it has been held to create an exception to the statutory rule, applicable to this general class of cases, requiring that they be brought in the district of the residence of one of the parties. Now, when we consider its primary purpose and the comprehensive terms in which it is couched, I am inclined to think it should receive a liberal construction, with a view to giving effect to the legislative intent. *Otherwise, a party having a local cause of action clearly falling within federal jurisdiction could not prosecute it in a federal court, for the reason that he could not bring his adversary into the only court having jurisdiction of the subject-matter.* Logically it follows that in considering its secondary purpose it must have the same construction. It is as broad for one purpose as it is for the other. In every case where it authorizes the constructive service of process it necessarily operates to create an exception to the general rule of the venue of actions. If, therefore, the issue between the plaintiffs and the defendants affects real or personal property within this district, and involves

the status thereof in such a manner that if the defendant could not be found in the district, it could be proceeded against upon constructive service, then the objection to the venue is without merit. . . ." (Emphasis added.)

In their desperate efforts to avoid justifying themselves before an impartial court, Fahey and Ammann attempt to deny even the jurisdiction of the Interpleader laws contained in Title 28, Section 41, Subd. 26, U. S. C., in Rule 22, Rules of Civil Procedure for Districts Courts of the U. S., and in the general equity powers of U. S. District Courts. They are even willing to forfeit nearly $1,000,000 of the depositors' money in the Registry of the United States District Court at Los Angeles, California.

Assume for a moment that their Motion to Dismiss was granted. The only thing that the court could then do with the money on deposit in the Registry is order it returned to those who had deposited it. To say that the court has not jurisdiction over money physically in its Registry is a contradiction in terms. The truth of the matter is that faced with the unpleasant choice of either answering the Summons of the court and setting forth their case before an impartial tribunal or forfeiting the shareholders' rights in the money deposited, the conservator Ammann and his superior Fahey, chose to forfeit. Probably they hope, through some of the same logic and reasoning with which they confiscate and appoint a conservator for a solvent, prosperous Association with $26,000,000 in assets and a $1,300,000 surplus, to collect the million dollars from the Registry of the court without letting the court decide the ownership of the money. They are equally indifferent to the fate of the 8000 home own-

ers who have transferred title to their homes to secure the payment of $12,000,000 in notes and deeds of trust payable to the Association and seized by the defendants Fahey and Ammann. They continue to collect the payments from the home owners, in fact, *to accept payment in full* from all those gullible enough to part with their money, *well knowing that they, Fahey and Ammann, are unable to* give borrower a clear title or an effectual release *of his home except through the aid of the very court whose jurisdiction they attack,* in proceedings which they are asking this Supreme Court to dismiss.

Suppose the action was dismissed. Fahey and Ammann will continue to collect the payments from the home owners, Title Service Company of necessity must continue to refuse reconveyances on the request of Fahey and Ammann, what then happens to the innocent home owners? The only way to compel Title Service Company to make reconveyance is to go to a court, State or Federal, having jurisdiction of the real property to which title is involved and only courts, either State or Federal, within the County of Los Angeles, State of California, can have such jurisdiction. If this action is dismissed, either the innocent home owners (whose average loan is approximately $1500) or the defendants Fahey and Ammann themselves must again go to court (and if the Federal courts are held not to have jurisdiction, the only remaining courts are those of the State of California), commence a new action wherein either the home owners or Ammann claim that Ammann has authority and the Title Service Company is wrongfully refusing to recon-

vey, and relitigate the very question now presented to this Honorable Supreme Court of the United States, through all the intermediate State courts of California, to the California Supreme Court and finally again to the Honorable United States Supreme Court for final determination of the question arising under the laws of the United States, the validity of Act of Congress, Section 5(d) of the Home Owners Loan Act. To assert that United States District Court created by Congress to determine questions arising under the laws of the United States which questions concerning the title to real property of 8000 homes within the jurisdiction of these same United States District Courts are without the power to decide such questions, is an unbelievably absurd contention. It is a part of the same claim of immunity from all courts exemplified by defendants Fahey and Ammann's conduct of both the Los Angeles bank and the Long Beach Federal confiscation. Defendants Fahey and Ammann assert that the conservator has not title to the property. But in the defendant Ammann's affidavit filed with this Honorable Supreme Court re Stay hearing at page 4, under oath he states that he *sold* $7,385,093.75 worth of United States Government Bonds belonging to said Association.

The affidavit of G. A. Walker, President of the Farmers & Merchants Bank of Long Beach [R. 397] discloses that the defendant Ammann has withdrawn from the bank account of the Long Beach Federal Savings and Loan Association, $1,566,000. Over $10,000,000 has

been paid out by defendants Fahey and Ammann to depositors of said Association withdrawing their funds in the run following the appointment of Ammann as conservator. The distinction attempted by appellants between conservator and receiver is one of their own making.

U. S. C. Title 12, Section 203 (cited by appellants), is part of the Bank Conservation Act enacted during the bank holiday in March of 1933. The Section itself provides, "During the time that such conservator remains in possession of such bank, the rights of all parties with respect thereto, shall, subject to the other provisions of this sub-chapter *be the same as if a receiver had been appointed therefor.*" (Emphasis added.)

The very case that they cite:

Smith v. Witherall, 102 F. (2d) 638, U. S. C. C. of App., 3d Cir.,

says, referring to conservators, "His appointment was the equivalent of the appointment of a receiver of a corporation with leave to continue the business and quite similar to the appointment of a trustee in the proceeding for the reorganization of a corporation under the Bankruptcy Act."

Defendants Fahey and Ammann deliberately overlook the very heart of the complaint of all appellees, which is the malicious use of powers which could apply only to insolvent institutions for the intentional destruction of solvent, prosperous, growing institution with a $1,300,-

000 surplus. At the risk of repetition we repeat, no case having to do with insolvency, bankruptcy, involuntary liquidation, or re-organization, of defaulting or endangered financial institutions, can have any application to this the Long Beach Federal Savings and Loan Association or to the Los Angeles Bank case. In *Smith v. Witherall*, by voluntary action of the directors of the bank, it had refused to honor withdrawals of its depositors, the court said:

> "In the present case the bank voluntarily closed its doors to its then existing depositors on February 20, 1933, and it never re-opened them. From that date it declined to meet its obligations and it never did meet them, consequently, it must have been held to be insolvent from that date . . ."

A case dealing with the appointment of a conservator for an insolvent institution declining to meet the withdrawals of its depositors has no application to the appointment of a conservator for an Association whose solvency was never in question and which had grown by nearly one-half a million dollars in deposits in the last month before its confiscation.

On page 49 of their brief, defendants Fahey and Ammann state:

> "It is apparent from the statute and the regulations that a duly appointed conservator, unlike a receiver, does not take title to the Association or its assets, see regulations Sec. 206.4.

There has, therefore, been no change in title, ownership, *or possession of property.*" (Emphasis added.)

No change in possession of property, but Ammann did not talk this way when he signed his own order appointing himself conservator.

"Whereas, it has been determined . . . to appoint a conservator to take possession of said Association, . . . Now, therefore, A. V. Ammann is hereby appointed conservator . . . *to take possession of said Association.*

I hereby certify that the above is an order issued by the Federal Home Loan Bank Administration on May 20, 1946.

A. V. AMMANN,
Assistant Secretary."

[R. 220.] (Emphasis added.)

If the conservator did not take possession, there was no need for such appointment. The decree [R. 498],

"That the said officers of the Long Beach Federal Savings and Loan Association be forthwith restored to and placed in full possession of . . . said Association and that the said defendants Fahey and Ammann . . . are hereby ordered to deliver, return, . . . *title, control and possession* of any and all property . . . owned by the Long Beach Federal Savings and Loan Association" (Emphasis added),

need not have been stayed.

When obtaining the Stay Order from Honorable Justice Rutledge, defendants Fahey and Ammann thought the action involved possession enough to provide in said Order that "If the said directors have already taken possession of said Long Beach Federal Savings and Loan Association, that the conservator A. V. Ammann *be placed back in possession forthwith.*" (Emphasis added.)

Have the defendants forgotten in April a Stay Order obtained by themselves in October without notice to the Asssociation appellee and by virtue of which they are yet *in possession* of the Association's assets and business?

Not only the specific provisions of the sections of the United States Code, but the equitable doctrine of doing full justice in one action, requires that the United States District Court which decides the title to the 8000 homes, the possession of the $26,000,000 in assets, the ownership of the savings of the 16,000 depositors should also decide and determine the entire action and all matters connected with it. Any other determination would result in not merely hundreds but thousands of separate litigations either in the courts of the State of California or in the District of Columbia.

Defendants Fahey and Ammann, supposedly public servants claiming to act for the public good, called into United States District Court to justify their action vitally affecting the small savings and the homes of 24,000 families in the County of Los Angeles, State of California,

do not exhibit the high fidelity and good faith required of public officials, by seeking to void responsibility for their acts in the locality in which those acts were committed. What benefit should the 24,000 citizens of California receive from re-litigating the same questions in the District of Columbia, Fahey's so-called residence?

This litigation is not between the management and the board of directors and Fahey [redacted] is between the 24,000 families who own the money, and property that Fahey and Ammann have seized, the shareholders and the home owners on one hand, and Fahey and Ammann on the other. The very doctrines urged by Fahey and Ammann for the existence of the power which they claim, that is, the protection of the savings and homes of the borrowers and depositors, also require that a speedy remedy by a fair and impartial court be instantly and conveniently available to check the unconstitutional encroachments of that power exercised malliciously against a solvent, prosperous, growing Association of home owners and small investors. It may be simple enough for a huge monopoly stretching across the nation to present its appeals for justice in Washington, D.C., but to require the 24,000 Long Beach home owners and savings depositors to journey the 3000 miles to Washington in their efforts to secure justice from the encroachments of Fahey and Ammann, who should be protecting and not destroying this Association is a complete denial of justice to those most entitled to the protection of the United States Courts.

III-B.

The District Court Had Jurisdiction Under Interpleader Under Title 28, Section 41, Subd. 46, U. S. C., Also General Equity Interpleader Powers, Also Under Rule 22, Rules of Civil Procedure for District Court of the United States.

The assertion that the defendant Fahey can physically invade through his agents and subordinates the premises owned by the Association, real property in the City of Long Beach, State of California, and by such invasion physically seize possession of over $26,000,000 in assets, $12,000,000 of which are deeds of trust conveying title to 8000 homes situated in the County of Los Angeles, State of California, withdraw bank accounts of millions of dollars, sell million of dollars of Government bonds thus seized, transfer the titles to hundreds of homes, in release of payment of millions of dollars of deeds of trust, pay out over $10,000,000 of Association assets in the run caused by the appointment of the conservator and yet be completely beyond the jurisdiction and immune from the process of the United States District Courts within whose boundaries all of these acts take place and all of this property is situated, is completely illogical. The equity doctrine of Interpleader of the Federal Interpleader Acts set forth in Title 28, Section 41, Subdivision 26, U. S. C., also set forth in Rule 22 of the Rules of Civil Procedure for the District Courts of the United States and the General Equity Powers of Interpleader, all concur in seeking a speedy final determination in one action of many conflicting claims and demands. In furtherance of this purpose: Title 28, Section 41, Subd. 26(c) U. S. C., provides, "Process shall run throughout the United States."

Defendant Ammann, the same time that he was claiming to be immune from process and beyond the jurisdiction in the United States district courts at Los Angeles, California, was attempting to convey millions upon millions of assets of the Long Beach Federal Savings and Loan Association within the boundaries of the Federal district court at Los Angeles, and to make such conveyance while himself within the boundaries of that court. The Home Investment Company, a California corporation, owning property covered by 174 of the 8000 deeds of trust attempted to pay off its obligation to the Long Beach Federal Savings and Loan Association and the defendant Ammann tendered said 174 notes and deeds of trust to the trustee named therein, the Title Service Company with his, defendant Ammann's, request that the Title Service Company reconvey the legal title to the 174 parcels of real property all situated in the County of Los Angeles, State of California. The Title Service Company being unfamiliar with Ammann as having any authority to deal with the assets of the Long Beach Federal Savings and Loan Association, inquired of the officers and directors of said association as to the validity of Ammann's dealings with the association's property and was advised by said officers and directors that if it reconveyed the legal titles to these properties the Title Service Company would do so at its peril.

Very shortly thereafter, Title Service Company was served as a defendant with a copy of the original summons and complaint of plaintiffs. Faced with this situation defendant Title Service Company filed its cross-claim in Interpleader in the Federal Court of Los Angeles, California and deposited therein in the registry of said court;

174 original notes and deeds of trust. Home Investment Co. still seeking to pay off its loans intervened in the Federal Court action in Los Angeles, and deposited approximately $800,000 with the registry of the Federal Court of Los Angeles and asked the court to allow the money to be substituted for the real property, security for the 174 notes and deeds of trust and to require a reconveyance of Title Service Company as trustee. This District Court of Los Angeles did. Dozens of other homee owners have intervened similarly and deposited the amounts of their obligations with the registry of the Federal Court. The original notes and deeds of trust have also been deposited with the registry and the real property involved reconveyed. Title Service Company in addition to physically depositing the 174 notes and deeds of trust also, by its bill in nature of interpleader, placed within the jurisdiction of the District Court at Los Angeles, the approximate $12,000,000 in value of additional notes and deeds of trust conveying the title to 8000 parcels of real property, all as more fully herein before set forth, payable within, situated within, the trustee within, and the borrower's residence within, the County of Los Angeles, State of California, and yet defendant Fahey and Ammann insist that the District Court at Los Angeles, California, is without jurisdiction to determine the ownership and title to those enormous amounts of property physically within the registry of the court itself.

The interpleader statutes of the United States are, of course, otherwise.

Both venue and jurisdiction upon such interpleader are nationwide; Title 28, Section 41, Subdivision 26-c of U. S. Code, reads as follows:

> "(c) Notwithstanding any prevision of Part I of this Title to the contrary, said Court shall have power to issue its process for all such claimants and to issue an order of injunction against each of them, enjoining them from instituting or prosecuting any suit or proceeding in any State Court ~~or~~ in any U. S. Court on account of such money or property or on such instrument or obligation until the further order of the Court; which process and order of injunction shall be returnable at such time as the said court or a judge thereof shall determine and shall be addressed to and served by the U. S. Marshall for the respective districts wherein said claimants reside or may be found."

If this Honorable Supreme Court should hold that the district courts of Los Angeles, California does not have jurisdiction under these circumstances the 8000 borrowers unable to clear the title to their homes, tangled and encumbered by Fahey and Ammann, are helpless indeed.

These interpleader proceedings are entirely independent of the main action and will support it, even if the main action fails. This is exemplified in the case of:

Railway Express v. Jones, 106 F. (2d) 341 (1939) (Circuit Court of Appeal, Seventh Circuit).

This was originally a class action brought by plaintiff Jones on behalf of himself and of numerous other victims of a swindle. All of the individual losses have been less than $500.00 each, but the total of all losses exceeded $24,000.00. The Collector of Internal Revenue asserted claim to the $24,000.00 for non-payment of income tax by de-

fendants who were perpetrators of the fraud. Railway Express had the $24,000.00 in its possession and moved to file its counterclaim in the nature of interpleader. The trial court denied the motion. The Circuit Court of Appeal reversed and ordered the interpleader to be allowed.

The opinion said:

> "The Railway Express Co.'s right to file its interpleader is not established nor defeated by the merits of plaintiff's claim. . . . Where the possessor of funds can establish the essential and jurisdictional facts prescribed in the statute, his right to relief under this section is absolute.
>
> "By proceeding under the counter-claim of Railway Express, the jurisdiction of the court will be unassailable and the claims of all claimants may be litigated exactly the same as in a proper class suit."

In another case none of the claimants to the fund interpleaded were found to be entitled to any part of it, notwithstanding which the interpleader was held entirely proper. The case is:

> *McGraw etc. v. Sherman Plastering Co.*, 60 Fed. Supp. 504, U. S. District Court, 1943.
>
> "INTERPLEADER, KEY No. 30.
>
> "A general contractor's complaint in interpleader action was not dismissible under Federal Interpleader Act as liberalized by federal rule, notwithstanding in outcome none of defendants was entitled to specific fund in court, where complaint alleged facts showing that general contractor was exposed to hazard of multiple claims under subcontract, and subcontractor's materialmen by their counter-claims brought issues involved under general contractor's bond into the

case. Judicial Code, paragraph 24 (26), 28 U. S. C. A. paragraph 41 (26); Federal Rules of Civil Procedure, rules 12(b), 22, 28 U. S. C. A. following section 723c. . . .

"Altogether I am satisfied that McGraw was subject to multiple liabilities and that the case is within the scope of the Federal Interpleader Act, 28 U. S. C. A. paragraph 41 (26), as liberalized by Federal Rules of Civil Procedure, rule 22, even though in the outcome, Sherman having suffered a default, I find none of the defendants entitled to the specific fund in court."

Defendant Fahey guilefully pleads to this court that he can be sued only in the District of Columbia well knowing that if this action is the Federal Courts in California be dismissed, the District of Columbia Federal Courts will have no jurisdiction over the 8,000 parcels of real property or over the $26,000,000.00 in assets. Defendant Ammann will of course remain in California and claim immunity from the process of the District of Columbia Courts even as Fahey is now claiming immunity from the process of the California Federal Courts. The District of Columbia Courts would have before them only Fahey, and Fahey and Ammann have, as alleged in the Third Party Complaint of Long Beach Federal against the Federal Home Loan Bank of San Francisco, Federal Home Loan Bank of Los Angeles and Federal Home Loan Bank of Portland, attempted to transfer beyond the reach of any process against Fahey and Ammann personally, more than $7,000,000.00 of the assets of said defendant

Long Beach Federal which they, Fahey and Ammann, seized here in California. Each of these Federal Home Loan Banks is within the reach of the process of this Federal District Court in California, but of course beyond the reach of the District of Columbia courts. Actually, Fahey and Ammann are conniving to prevent any Court anywhere from ever reviewing their acts. Why they, as government officials, should be unwilling to submit to a United States Court the questions of the propriety, validity and constitutionality of their acts is a question to be answered only by their conduct. Government officials proud and unashamed of their acts should have no hesitation to justify themselves before any Court when called into question by the 16,000 innocent shareholders whose property they have seized. Dilatory plans attempting to evade the hearing on the merits on fine distinction of venue and jurisdiction come with a very poor grace from Federal officials under these circumstances. If any court has jurisdiction except the court at Los Angeles, it could only be in the District of Columbia Federal Court. Are these 8000 borrowers to trek 3000 miles across the United States to pay off their loans and get a clear title to their homes? Are these 16,000 shareholders to present their pleas for justice 3000 miles from the location of the institution in which they deposit their money? Are these 24,000 home owners and savers helpless against appellants' tyranny so long as Fahey stayed 3000 miles from the scene of his invasion and confiscation? If defendants Fahey and Ammann are right, what is to become of the

nearly $1,000,000 physically in the registry of the Federal Courts of Los Angeles, California? If these courts are without jurisdiction to determine who is the owner of this money, Section 118, U. S. C. and Section 41, Subdivision 26c, U. S. C. must both be repealed by the decision of this Honorable Supreme Court. Why are defendants Fahey and Ammann so fearful to submit the justice in their cause to the decision of impartial federal judges at the scene of defendants Fahey and Ammann depredations? If there was any justification and truth in fact for these arbitrary confiscations certain federal officials should not hesitate to submit these matters to the Federal Courts. When the Congressional Investigating Committee, with unquestionable powers of subpoena, demanded of defendants Fahey and Ammann physically in their presence, the justification for these outrageous invasions, they told the Congressional committee the matters would be submitted to the Courts. But when the time comes to plead in court, no facts are given, the plea is made, "we are beyond the power of all courts."

Must every one of the 8000 home owners and the 16,000 whose savings are represented in the assets of this institution follow day by day the progress of the litigation 3000 miles away in the District of Columbia to determine who holds the title to their homes and savings? Must every citizen throughout the United States having any contact with the Federal Home Loan Bank of Los Angeles or the Long Beach Federal Savings and Loan Association also be in Washington, D. C. to protect his sav-

ings and homes? Must they set out in pursuit of their seized and merged assets to whatever final resting place is determined by the defendants Fahey and Ammann?

The stockholders of the Portland Bank are now stockholders of a bank in San Francisco, California. Is their only remedy to go to the District of Columbia Federal Courts? The merger and transportation of the assets of the seized Long Beach Federal Savings and Loan Association has been prevented by the restraining order of the District Courts at Los Angeles. If those courts are held without authority to have restrained the flight of the assets, where does such authority rest? Clearly if the Los Angeles Federal Court, wherein its boundaries is situated the $26,000,000 in question, has no power over this property, certainly none of the courts of any of the jurisdictions to which the property may be merged or transferred, would have any jurisdiction and the only recourse of these thousands of people is to hope to catch the defendants Fahey and Ammann, both at the same time, in the District of Columbia on one of their meetings between their swings around the country merging and liquidating institutions in California to Oregon and each of the other 48 states, and possibly within the territories of Hawaii and Alaska.

In fact if the merger power be upheld, and the lack of jurisdiction be determined, it would be impossible for those whose savings and homes, are being dealt with to be fleet enough in pursuit to ever catch up with the flight of the assets in the hands of appellants.

III-C.

Fahey Not an Indispensable Party.

Having demonstrated, we believe, beyond refutation, that the Court had jurisdiction over the $26,000,000 in real property and other assets physically within its boundaries, we come to appellants' contention that, because Fahey was not personally present committing his own depredations, but was acting through Ammann and other subordinates physically within the boundaries of the District Court and carrying out Fahey's orders against property, savings and homes, physically within the boundaries of the Court, that merely because of Fahey's absence, the District Court, where the property is and where the depredations are committed, is helpless to administer justice. The doctrine is not advanced upon the basis that Fahey is a government officer. The rule he seeks to apply would apply to any ordinary citizen. It has been rejected many times and whatever application it might have to the jurisdiction under Title 28, Section 118, U. S. C., it could have no application whatever to the interpleader jurisdiction. Title 28, Section 41, Subd. 26(c) U. S. C., says:

> "Notwithstanding any provision of Part I of this Title to the contrary, said Court shall have power to issue its process for all such claimants . . . which process . . . shall be addressed to and served by the U. S. Marshall for the respective Districts wherein said claimants reside or may be found."

See *Trieues v. Sunshine Mining Co.*, 308 U. S. 66 at page 70, which holds that such process runs throughout the United States. Realizing the jurisdiction is thus acquired over Fahey, at least to the extent of the $12,000,000 in notes and Deeds of Trust interpleaded in the bill

in the nature of interpleader and that Fahey is faced with the unpleasant choice of submitting to the jurisdiction of the Courts, in the district in which he committed his depredations or the equally unpleasant choice of defaulting and allowing judgment to go against him at least as to this $12,000,000. At pages 46 to 57 of Appellants' Brief, they undertake one of the most strained constructions they have yet presented: That is, that the conservator got neither title to, nor possession, of the property he seized and that neither he, nor Fahey, are making any claim to any of the $26,000,000. In these pages of their Brief, they claim that Fahey, so long as he stays out of California, can authorize Ammann to physically seize possession of the $26,000,000 in assets; to sell more than $7,000,000 of the association's bonds (this sale apparently has no effect on the title. We wonder if the purchasers of these bonds will concur that they acquired no title when they bought from Ammann) to sell or pledge $10,000,000 worth of the very Trust Deeds covered in the bill in the nature of interpleader; to pay out more than $10,000,000 of the association's assets to withdrawing shareholder depositors; to purchase hundreds of thousands of dollars worth of additional stock in the Federal Home Loan Bank of San Francisco; to withdraw over a million and a half dollars from the association's bank accounts. All of these actions, according to Fahey and Ammann, do not involve either title to or possession of any of the tens of millions of dollars of property thus sold and transferred. In his Brief, Appellant Fahey claims the right to merge the association at his Will and so long as he signs his order of merger, outside of California, and himself stays outside of California, he says, the District Court

is helpless to prevent his action. Overlooking entirely the fact that unless his merger order conveys the title to the merged $26,000,000 in assets, the recipient of the merger would receive nothing. He also claims that he makes his order in Washington, D. C. for his "administrative hearing" wherein he judges himself to justify his own acts that he can order such hearing held within the boundaries of the U. S. District Court and that such Court is also helpless to prevent this usurpation. Again ignoring Title 27, Section 41, Subd. 26(c), U. S. Code, which reads,

> "Notwithstanding any provision of part I of this Title to the contrary, said Court shall have power to issue . . . an order of injunction . . . . enjoining them from instituting or prosecuting any suit or proceeding in *any* state Court or in *any* U. S. Court, on account of such money or property or on such instrument or obligation until the further order of the Court which . . . . order of injunction . . . shall be addressed to and served by the U. S. Marshall for the respective Districts wherein said claimants reside or may be found." (Emphasis added.)

In the face of this language, Fahey yet claims to be beyond the power of the U. S. District Court, which has interpleaded $12,000,000 of notes and deeds of trust in this action, and that he can notwithstanding such interpleader ignore the injunction of the Court and merge the association and the $12,000,000 as he pleases, thereby defeating the power of the District Court to adjudicate concerning the interpleaded property. He also claims notwithstanding the Court's power to enjoin any suit or "proceeding in any State or U. S. Court", that he can conduct his own court, his self constituted administrative hearing, wherein he judges for himself and makes his own decisions in

favor of himself and ousting the U. S. District Court of its jurisdiction given by the Congress of the U. S. in the language of said Subd. 26(c) above quoted. One who seeks desperately to avoid submitting the justice of his case to impartial U. S. Courts must have very good reasons for so doing. Why is appellant Fahey so insistent that no one but himself can administer justice between himself and those whose homes and savings he has seized? Even regardless of the jurisdiction of Section 118 and of Section 41, Fahey is not an indispensable party.

The unconstitutional act, Section 5-D H. O. L. C. of 1933 provides no protection for Ammann's acts within the boundaries of the District Court and renders Fahey's presence unnecessary. See:

Colorado v. Toll (1925), 268 U. S. 220. 45 S. Ct. 505, 69 L. Ed. 927,

wherein the court said:

> "This is a bill brought in the District Court by the State of Colorado to enjoin the superintendent of the Rocky Mountain National Park from enforcing certain regulations for the government of the park, which are alleged to be beyond the authority it conferred by Acts of Congress, and to interfere with the sovereign rights of the state. These regulations forbid any person to reside permanently, engage in any business, or erect buildings in the park without permission in writing from the Director of the National Parks Service, provide for the removal of disorderly persons and forbid their return without permission from the Director, and impose a fine or imprisonment or both, for violating these regulations, the defendant, it seems, being the sole judge. The special subject of complaint is a further regulation, subject to similar penalties, that the park is open to automo-

biles operated for pleasure, but not to those carrying passengers, who are paying, either directly or indirectly, for the use of machines, (excepting however, automobiles used by transportation lines operating under government franchises).' It is alleged that the defendant and his superior officers assert full authority over all highways in the park, to the exclusion of the state, and refuses permission to anyone operating automobiles for hire except one corporation which has received a permit. . . . The bill was dismissed for want of equity by the District Court.

The object of the bill is to restrain an individual from doing acts that it is alleged that he has no authority to do, and that derogate from the quasi-sovereign authority of the state. There is no question that a bill in equity is a proper remedy, and that it may be pursued against the defendant without joining either his superior officers or the U. S. Missouri v. Holland, 252 U. S. 416, 431, 64 L. ed. 641, 646, 11 A. L. R. 984, 40 Sup. Ct. Rep. 382; Philadelphia Co. v. Stimson, 223 U. S. 605, 619, 620, 56, L. ed. 570, 575, 577, 32 Sup. Ct. Rep. 340. As the bill was dismissed upon the merits, it is not necessary to say more upon this preliminary question."

Also see:

Varnell et al., Florida Control Committee v. Hillsborough Packing Co. et al., 70 Fed. Rep. (2d) 434 (1934), Circuit Court of Appeals, Fifth Circuit,

wherein the court said:

"The interlocutory injunction was granted on the broad grounds, as stated by the district judge in an oral opinion which appears in the record, that the sections of the act involved and the means attempted for their enforcement by marketing agreement,

license, orders and penalties were unconstitutional and therefore void. On the question of jurisdiction, appellants argue that the Secretary of Agriculture is an indispensable party, that, because the prorate orders complained of have been revoked, the case is moot and that in any event appellees had no right to come into court seeking an injunction without first exhausting their administrative remedy by applying to the Secretary for relief against the orders of the control committee. We agree at once that the Secretary, not being before the court, could not be enjoined from enforcing his regulations. Gnerich v. Rutter, 265 U. S. 388, 44 S. Ct. 532, 68 L. ed. 1068; Webster v. Fall, 266 U. S. 507, 45 S. Ct. 148, 69 L. ed. 411. But, if those regulations are indeed invalid, the control committee can not shield themselves behind the Secretary, or compel compliance written in his name. Colorado v. Toll, 268 U. S. 228, 45 S. Ct. 505, 69 L. ed. 927. *It follows that the Secretary was not an indispensable party.*" (Emphasis added.)

Also see

Brooks v. Dewar, 313 U. S. 354, 359.

The attempt to merge, liquidate and seize the $43,000,000 Los Angeles Bank and the $26,000,000 Long Beach Association, both situated in Los Angeles County, California, and at the same time to claim immunity from the United States courts created by Congress to test under Section 380(a), U. S. C., the validity of such actions merely because Fahey remains in Washington and acts through subordinates, comes with very poor grace from government officials, appointed to protect the savings and homes of the people.

IV.

THE DECREE OF THE THREE-JUDGE COURT ON MOTIONS WAS PROPER.

In their opinion of September 5, 1946, the three-judge statutory court had decided that Section 5(d) of the Home Owners Loan Act was unconstitutional. From this decision many inevitable consequences flowed.

In

Norton v. Shelby County, 118 U. S. 425, 30 L. Ed. 178,

the court said:

> "An unconstitutional act is not a law. It confers no rights. It imposes no duties."

This decision was cited with approval in *Chicago S. L. R. Co. v. Hachet*, 228 U. S. 559 at 566 (1913), and in *Chicot Co. Drainage Dist. v. Baxter State Bank*, 308 U. S. 371 at 374 (1940), and many Circuit Court of Appeals decisions.

Governmental officials and their subordinates acting under unconstitutional law were merely trespassers and without any authority whatsoever. Section 5(d) being unconstitutional placed the defendants Fahey and Ammann in exactly this position. Their only possible excuse for being in possession and control of the assets and business of the Association was such authority, if any, as they had under Section 5(d) and the three-judge court had just determined that they had no such authority. The Motions, Affidavits and Exhibits, Pleadings and other papers filed by all parties, particularly those filed by and on behalf of the defendants Fahey and Ammann, had completely dis-

closed their entire claims and defenses. This is demonstrated by the Answers actually filed by defendant Ammann after the taking of the appeal. [R. 520-537.] However, regardless of whether or not Answers had ever been filed nothing that either Fahey or Ammann could say in their Answers would serve to make valid and constitutional Section 5(d) which the court had just determined was unconstitutional and void. Under Rule 54(b), Rules of Civil Procedure for Districts Courts of the United States, the court was not only authorized but required in the decree in which it held Section 5(d) unconstitutional to at that time determine all matters connected with or arising from this question of constitutionality. There are, of course, many long and complicated trials and issues as yet undisposed of including among them the Answers of defendant Long Beach Federal Savings and Loan Association to plaintiffs' Complaint and to the various Interpleader Cross-claims. The Cross-claim contained in said Answer of Long Beach Federal Savings and Loan Association against the defendants Fahey and Ammann. The Third Party Complaint of Long Beach Federal Savings and Loan Association against the Federal Home Loan Banks of Los Angeles, San Francisco and Portland, the accounting by defendant Ammann for the tens of millions of dollars of assets, securities and property of said Association which he had bought, sold, transferred and dealt with without authority or right in law so to do. The disposition of the subsequent interventions similar to the $800,000 intervention of Home Investment Company, the allowance upon account of attorneys' fees and expenses of the various parties (a partial disposition of which has just been made by the allowance of $50,000 on account of attorneys' fees

and $17,295.13 to counsel for plaintiffs' Shareholders' Committee), and numerous other facets of this complex litigation had to be developed. The decree was final as to all matters concerning the validity and constitutionality of Section 5(d) AND THESE MATTERS WERE PROPERLY DETERMINED FROM THE CONTEXT OF THE ACT ITSELF AND COULD NOT BE ALTERED IN ANY WAY BY ANY PLEADING OR ACTION OF ANY OF THE PARTIES.

In the administration of justice the courts have been striving throughout the various reforms in procedure to expedite and speed up the process of the administration of the law. The Rules for Civil Procedure for District Courts of the United States adopted by this Honorable Supreme Court in 1938 pursuant to the Act of Congress was one of the greatest remedial improvements in judicial history. It simplified and expedited the formerly previous methods of pleadings with their numerous handicaps and hindrances upon the action of judges seeking to cut through a maze of technicalities and administer speedy justice.

It undoubtedly would have greatly pleased defendants Fahey and Ammann for the three-judge statutory court to have allowed them to remain in possession during the years which would necessarily elapse before a final disposition of all of the intricate details necessarily attendant upon litigation of this magnitude. But why should trespassers under an unconstitutional law retain the fruits of such trespass for this lengthy period?

Assume for a moment that the adjudication of unconstitutionality is sustained by this Honorable Court (as we are convinced that it is correct and will be sustained), and the case then returned to the three-judge court for disposition of the undecided matters, what further pro-

ceedings will affect the validity of Section 5(d) under the United States Constitution?

Courts of equity have faced similar problems in other cases and have not found themselves without power to effect a complete remedy.

In the case of *Alleger Ky. Oil Co. v. Snyder et al.*, 106 Fed. 764, U. S. Circuit Court of Appeals, 6th Circuit, the action was decided and a final judgment entered by the trial court upon applications for temporary injunctions. An appeal was taken in the Circuit Court of Appeals, among other things, on the ground that the trial court erred in disposing of the cases on their merits without a trial. This contention was overruled and the trial court judgment affirmed, in the following language:

> "Where cross-suits between two lessees of the same property were heard together by a federal court upon motions for preliminary injunctions, submitted on bill, answer, and affidavits in each case, and the rights of the parties depended solely on the validity and construction of the first lease, the facts being substantially undisputed, the court had power to enter final decree on such hearing.
>
> "It is urged by counsel for appellant that the circuit court erred in disposing of the cases on their merits, and entering final decrees therein without taking proofs in due course under the equity rules. The cases came on for hearing on the application of the oil company for a temporary injunction, the granting or refusal of which necessarily involved the continuing of the injunction granted in the state court, as well as the cross application of the oil company for an injunction. The court considered these cases together. The cases stand upon bill, answer, and affidavits. In view of the construction given the

Snyder lease in the Circuit Court, affirmed in this court, the holders thereof were entitled to have their rights protected, and interference therewith by holders of the second lease enjoined. The first lease being held valid, the attempted second lease must necessarily fail. There was nothing in the bill of the Allegheny Oil Company in the one case, or its answer in the other, which required further testimony before construction and effect could be given to the first lease. As was said by Judge Thompson in the circuit court, the facts were substantially undisputed. The allegations made that Fowler understood the premises were to be promptly drilled for oil and gas could not affect the agreement as reduced to writing, in the absence of allegations of fraud or mistake. There was no attempt to reform the instrument. No amendment to the bill or answer was proposed, nor has there been any suggestion of further facts material to the controversy. In such cases the courts of the United States may proceed to administer final relief without putting the parties to the expense and delay of protracted litigation. Mast, Fees & Co. v. Stover Mfg. Co., 177 U. S. 485, 20 Sup. Ct. 708, 44 L. Ed. 856, citing, with approval, Cardt v. Brown, 113 Ill. 475; Green v. Mills, 16 C. C. A. 516, 69 Fed. 852, 25 U. S. App. 383; and the decision of this court in Mayor etc. of Knoxville v. Africa, 23 C. C. A. 252, 77 Fed. 501, 47 U. S. App. 74. Finding no error in the decree entered in the court below, the same will be affirmed."

THE UNITED STATES SUPREME COURT REFUSED TO GRANT CERTIORARI TO REVIEW THIS JUDGMENT, such refusal being contained in 45 L. Ed. 1930, 181 U. S. 618 (1901). Case No. 617.

As so aptly said:

> "Nor has there been any suggestion of further facts material to the controversy. In such cases the courts of the United States may proceed to administer final relief without putting the parties to the expense and delay of protracted litigation."

While appellant Fahey has vehemently insisted to the court that he wants to raise defenses in his answer, for reasons of his own, he has completely failed to specify the nature of any of such defenses.

The District Court for the Southern District of California has in the case of

Coca Cola Co. v. Los Angeles Brewing Co., 1 Fed. Rules Decs., p. 67,

wherein Judge McCormick, presented with a similar situation, granted a permanent injunction finally disposing of the entire case upon the application for a temporary injunction, used the following language:

> "(1) The court believes that these matters are admittedly in the sound discretion of the court, to be exercised judicially and not arbitrarily. There is, however, a fixed principle in patent law and I dare say it is applicable in trade-mark litigation as well. It has been applied in many cases by this court. It operates where there isn't anything to be gained by prolonging litigation except to afford one or the other of the litigants a respite and moratorium to suspend the enforcement of rights; but that is no safe criterion in determining the course that the court should follow on an application for a preliminary injunction. It usually applies in patent litigation where there has been a prior adjudication validating a patent and the only question at issue is one of infringement. There

the situation can be arrived at generally, except in so far as the question of infringement is concerned, just as securely and much more satisfactorily on the preliminary application as it can by a trial after a long hearing, expensive both as to time and as to money.

"(2) What is there here that can be modified or changed or that needs any further exploration? What factual situation is there that could be any more definitely presented to the court in January than today? I think there is nothing. There may be many more affidavits filed on each side of the question. There may be a great deal of oral testimony developed on both sides of the issue. There may be extensive arguments made as to the effect of those matters but, upon analysis, the same issue will be presented; if that is the case, it should be determined summarily.

. . . . . .

"(5) . . . It seems to me that in the interests of both sides of the case it should be decided now. . . . An injunction will issue accordingly restraining the use or sale or advertisement of a beverage of this type or any beverage for human consumption using the word 'coke.'"

As Judge McCormick so aptly said:

"What is there here that can be modified or changed or that needs any further exploration? What factual situation is there that could be any more definitely presented to the court in January than today? . . .

Upon analysis, the same issues will be presented. If that is the case it should be determined summarily."

In addition, the Federal Rules of Civil Procedure, Rule No. 54, reads in part as follows:

"(a) Definition: Form. 'Judgment' as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

"(b) Judgment at various stages. When more than one claim for relief is presented in an action, the court at any stage, upon a determination of the issues material to a particular claim and all counter claims arising out of the transaction or occurrence which is the subject matter of the claim, may enter judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims. In case a separate judgment is so entered the court by order may stay its enforcement until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered."

This language is particularly significant:

"In case a separate judgment is so entered the court . . . may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered."

Judgment is defined as including "any order from which an appeal lies."

If the Act of Congress be held by this Honorable Supreme Court to be unconstitutional, an affirmance of the judgment of the court below is required "to secure the benefit thereof to the party in whose favor the judgment is entered." If, on the other hand, Section 5(d) be sustained, questions of the validity, constitutionality and application of the regulations, matters which directly require substantial factual inquiry, at once present themselves. Trial upon oral testimony by all parties would be required to determine these issues, but could lend nothing to the decision as to whether or not Section 5(d) is unconstitutional. This must be determined by the language of the Act itself. We believe for the reasons elsewhere more fully stated that Section 5(d) is so repugnant to the American standards of equality and justice and to the Constitution of the United States that it cannot be allowed to stand.

V.

NEITHER SHAREHOLDER MEMBERS PLAINTIFFS NOR THE ASSOCIATION ITSELF WERE ESTOPPED TO ASSERT THE UNCONSTITUTIONALITY OF THE ACT OF CONGRESS.

Appellants seek to prevent a hearing by this Honorable Supreme Court on the merits of the unconstitutionality of Section 5(d) by urging the plea, that the shareholders plaintiffs in this case whose savings are at issue are estopped or prevented from seeking the protection of the three judge statutory court and of this court accorded to the plaintiffs by the Constitution of the United States. Estoppel is an equitable doctrine used to prevent the imposition or taking advantage by guilty party, of an innocent party. Actually, if anyone is estopped, appellants Fahey and Ammann are the parties estopped. The very charter granted the Association contains the following language: "The Association shall have perpetual succession and power . . . to wind up and dissolve, merge, consolidate or re-organize in the manner provided by law, and rules and regulations made thereto." . . . "The Association shall have such powers as are conferred by law and shall exercise its powers in conformity with the HOLC Act of 1933 and all the laws of the United States as they now are or as they may hereafter be amended, *and with the rules and regulations made thereunder which are not in conflict with this charter.*" [R. 164.] In other words, by a contract between Fahey's predecessors the 5-man Board and the shareholders, Fahey could not amend his regulations in any way to conflict with the charter granted by the 5-man "Board." His amendment giving him the right to appoint a con-

servator which would, of course, cut off the "perpetual succession" is in conflict with the charter and not binding upon these shareholders. The real issue of the constitutionality of 5(d) was submitted to the court by the shareholders on the merits regardless of this estoppel of Fahey by his own charter, but characteristically appellants unwilling to submit their case on the merits and squarely meet the issue of the justification, if any which they had for their confiscation of the Association have attempted to obscure the issue by saying that the shareholders had consented in advance to the confiscation of their savings at the will of the appellants Fahey and Ammann.

Certainly if the power of merger is given to the Association under its charter [R. 164], it cannot be exercised by Fahey in conflict with that charter. If the contention of appellants is correct that by depositing their savings in a Federal Savings and Loan Association, every depositor is estopped from asserting his rights under the United States Constitution and the Association itself is also estopped to make any effort to protect its depositors, then by this doctrine alone Fahey will have established complete dictatorship. The Act unquestionably unconstitutional (because of its unwarranted and excessive delegation of power to enact the laws of the United States), automatically becomes completely constitutional the moment the home of the small home owner or the small savings of a family are entrusted to such an institution.

Under this theory every unconstitutional confiscation is completely legal provided only the usurper can inveigle

his victim into, in some way participating in the unconstitutional law. If the shareholders are estopped to contest the appointment of a conservator, they are also estopped to contest the complete appropriation of their savings and their homes to any purpose which may please appellant Fahey. The mere statement, of course, demonstrates the absurdity of the contention. No court of equity will ever tie its own hands to prevent oppression, whether by a government official under an unconstitutional law, or by any other wrongdoer. Estoppel is aptly stated to be a shield and not a sword, to prevent injustice and not to perpetrate it. For appellants who have seized and confiscated the savings and homes of 24,000 families to attempt to interpose equitable estoppel as a defense, is insufferable. Our Supreme Court in an early case stated:

> *South Ottawa v. Perkins*, U. S. Sup. Ct., 94 U. S. 260, 24 L. Ed. 154.
>
> " . . . We cannot assent to this view. There can be no estoppel in the way of ascertaining the existence of a law. That which purports to be a law of a state is a law or it is not a law, according as the truth of the fact may be, and not according to the shifting circumstances of parties. It would be an intolerable state of things if a document purporting to be an Act of the legislature would thus be a law in one case and for one party, and not a law in another case and for another party: a law today, and not a law tomorrow; a law in one place, and not a law in

another in the same State. And whether it be a law or not a law is a judicial question, to be settled and determined by the courts and judges. The doctrine of estoppel is totally inadmissible in the case."

Of what benefit has the statute been to the shareholders, if it only entices them into entrusting their savings and homes to an institution to be merged, liquidated, dissolved or reorganized at the whim of Fahey?

We are not estopped by what was in the Act, because nothing in the Act or the Regulations would have warned anyone as to what has actually happened to the Los Angeles Bank and the Long Beach Association. Had the Act read, "Every depositor's savings are subject to confiscation without hearnig, and without notice at the unrestrained will of a one man board," and had any one under such conditions entrusted his money to such an institution, he would have only himself to blame. But where the arbitrary, tyrannical confiscation does not appear until after the institutions are created and the deposits made; estoppel cannot prevent those thus imposed upon from asserting their constitutional rights.

Estoppel is an equitable doctrine, not a hard and fast rule of law. Estoppel is applied or refused by courts of equity as justice and conscience require in each particular case. Does this Honorable Supreme Court believe that equity and conscience require the sustaining of these two confiscatory seizures?

VI.

THE THIRD PARTY COMPLAINT AGAINST THE FEDERAL HOME LOAN BANKS OF SAN FRANCISCO, LOS ANGELES, AND PORTLAND WAS PROPER.

At pages 99 and 100 of Appellants' Brief, without citing any authority or decision whatsoever for their statements, they undertake to raise, for the first time in this Honorable Supreme Court, a point they have never presented to the court below, a point not involved in any way in the judgment appealed from, and a matter not yet passed upon by the District Court. There was no motion on the part of appellants, Fahey and Ammann, to dismiss the Third Party Complaint, nor was any attack whatsoever made upon it by them before the court below.

Defendant Ammann was transferring to and from the Federal Home Loan Bank of San Francisco or to and from the Federal Home Loan Banks of Los Angeles and Portland, or perhaps to the Los Angeles and Portland banks, depending on the validity of the seizure and merger of the Los Angeles bank, tens of millions of dollars of government bonds and notes and deeds of trust owned by the Long Beach Federal Savings and Loan Association, obtained by Ammann by his seizure of the assets of said Association. [R. 228.] The validity and effect of these transfers was subject to serious doubts on two grounds:

1. As to what authority, if any, Ammann had to transfer the assets of the Long Beach Federal Savings and Loan Association to anyone, and,

2. To which of the three Federal Home Loan Banks, San Francisco, Portland or Los Angeles were the transfers being made.

Defendant Ammann also transferred the $340,000 worth of stock owned by the Association in the Los Angeles bank to the San Francisco bank and purchased with Association funds, hundreds of thousands of dollars of additional stock in the San Francisco bank.

The Third Party Complaint alleges in substance that prior to the seizure, liquidation and merger of the Federal Home Loan Bank of Los Angeles by these same appellants, Fahey and Ammann, the association Third Party plaintiff was the owner of 3,714 shares of the capital stock of the Federal Home Loan Bank of Los Angeles [R. 225]; that the value of such stock, together with its share in the surplus of said bank was approximately $380,000; that at the time of said seizure of said Los Angeles bank, it held approximately five to six million dollars of bonds belonging to Long Beach Association [R. 228]. That said appellants Fahey and Ammann seized such bonds when they made their seizure of the Los Angeles bank and when they seized the Long Beach Association, they also seized all records of amounts, serial numbers and designations of said United States Bonds; that appellants Fahey and Ammann had transferred, assigned and sold millions of dollars of bonds, notes and deeds of trust belonging to the Long Beach Association to the purportedly created Federal Home Loan Bank of San Francisco also a third party defendant. [R. 228.] That all of said transactions, including the seizure of the Los Angeles bank, creation of the San Francisco bank and the liquidation and merger of the Los Angeles

bank into the Portland bank were unconstitutional and void as were the seizure of the Long Beach Association and the transfer and sale of its millions of dollars of assets to the purported San Francisco bank. That all of said transactions involve the same questions of law involved in the main action, which is the constitutionality and validity of Fahey's and Ammann's seizure of the Long Beach Association and Fahey's and Ammann's merger and liquidation of the Los Angeles bank. The Third Party Complaint asked adjudication as to which of the three banks, Los Angeles, Portland, or San Francisco, was liable to the association for the approximately $6,000,000 in bonds seized by appellants, Fahey and Ammann and merged by them when they liquidated and merged the Los Angeles and Portland banks, and attempted to create the San Francisco bank.

It also asks adjudication of which of the three banks the Association is now a stockholder and when this is determined, it seeks an accounting of such bank for Long Beach Federal assets transferred to such bank by Fahey and Ammann.

It was thus apparent that identical questions of law and fact are presented:

First: In plaintiff's complaint against Fahey and Ammann.

Second: In defendant and cross-claimant Long Beach Federal Savings and Loan Association's cross-claim against Fahey and Ammann, and,

Third: In the Association's Third Party Complaint against Federal Home Loan Banks of San Francisco, Portland, and Los Angeles, however, the relief asked differs.

A decision of the law as to constitutionality of Section 5(d) will apply equally to Ammann's and Fahey's transfers of the Long Beach Association's assets to the San Francisco bank as it applies to Fahey and Ammann themselves. The liquidation and dissolution of the Los Angeles bank, creation of the San Francisco bank and the seizure of the Long Beach Association were all acts performed by appellants Fahey and Ammann in dealing with Long Beach assets. They took them out of one pocket as conservator for Long Beach and put them into another pocket created by them as the Federal Home Loan Bank of San Francisco.

The seizure of Long Beach arose from its resistance to these same appellants Fahey and Ammann confiscating the Los Angeles bank of which Long Beach was a stockholder and in which Long Beach had millions of dollars of Government bonds on deposit.

Is this litigation to be decided at one time in one case by judges familiar with all the circumstances or is it to be split up into many separate litigations solely for the benefit of appellants Fahey and Ammann? Rule 14 of the Rules of Civil Procedure for District Courts of the United States clearly authorizes the procedure taken in this case. Appellants Fahey and Ammann had already transferred and were in the process of further transferring the specific assets to one of the three defendant Home Loan Banks which assets thus transferred were the subject of the main action involving appellants Fahey and

Ammann and the Long Beach Association. The lower courts have held in:

Kravens v. Great Atlantic and Pacific Tea Co., 28 Fed. Supp. 66 (U. S. Dist. Ct.),

> "It is immaterial that the liability of the third party defendant may be based on a different contract than the agreement existing between plaintiff and original defendant, if the liability arises out of substantially the same set of facts."

And in:

Falcone v. City of New York, 2 Fed. Rules, Dec. 87, U. S. Dist. Ct., East. Dist. N. Y. (1941),

> "The Federal Rule as to when defendant may bring in third party defendant vests no discretion in Court to deny defendants application to bring in third party when facts warrant it." (Fed. Rules C. P. 14, 28 U. S. C. A., following section 723.)

See also,

Grim v. Lumbermans Casualty Co., 28 Fed. Supp. 715 (1939), Dist of Col., U. S. Dist. Ct.,

> "Defendant may bring in third party defendant by third party complaint setting out claims which might have been asserted against said third party defendant, had he been joined originally as a defendant in the original action."

No doubt it is somewhat embarrassing to appellants Fahey and Ammann to have both their unconstitutional seizure, liquidation, and merger of the Los Angeles bank and their unconstitutional seizure of the Long Beach Association considered by the same court at the same

time because the facts and law are practically identical. Nevertheless such procedure is not only authorized by the Federal Rules, but has been long the practice of equity courts who once having taken jurisdiction of part of a controversy exercise their equitable powers to determine in one action all disputes of the parties involved in the matter.

It is respectfully submitted:

1. That this point cannot be raised for the first time upon appeal by appellants who chose not to present their objections to the court below, and

2. That regardless of when or where questioned, the bringing in of the Third Party defendants was not only proper but very necessary to the ultimate disposition of the flood of litigation caused by these two confiscations and seizures by appellants Fahey and Ammann.

Conclusion.

The decree of the Three Judge Statutory Court was not only legally correct, but far more important, was imperatively required to correct the manifest injustices committed and continued by appellants, Fahey and Ammann. Its affirmance by this Honorable Supreme Court will speedily terminate litigation which otherwise must be prolonged for years. Justice for the small home owner (the average loan is $1500) and for the small savings (the average savings account is $1425) will be thereby speedily administered. Even more important than the unconstitutionality of Section 5-D is the sustaining by this Honorable Supreme Court of the jurisdiction of the

Three Judge Statutory Court to protect such savings and homes from the encroachments of appellants who should be protecting and not seizing. A denial of such jurisdiction on the super-technical grounds advanced by appellants would harm not only the 24,000 home owners and savers but would nullify the procedural reforms embodied in the rules for Civil Procedure for District Courts of the United States, the interpleader acts, and other procedural advances in the administration of justice accomplished during the last half century. Speedy administration of justice has been the objective of all these reforms. Are we to go forward with such reforms, or back to the dark ages of the law, when justice was granted or denied, depending on the skill in technicalities of the counsel presenting the case?

Respectfully submitted,

CHARLES K. CHAPMAN,

Attorney for Appellee, Cross-Claimant and Third Party Plaintiff Long Beach Federal Savings and Loan Association.

APPENDIX "A."

Appellants in Appendix "C" of their brief quoted portions of the statutes of the states of New York, Massachusetts, California, Indiana, Ohio, New Jersey and Kentucky omitting from their quotation, other portions of the same statutes, providing immediate review by the Courts of the action authorized in the sections of the state laws quoted by appellants. We feel that the omitted sections which provide due process are all that prevent the sections quoted by appellants from being unconstitutional as is Section 5-D H. O. L. C. Act. We respectfully urge the reading of Appendix "A" of our brief concurrently with Appendix "C" of appellants' brief.

McKinney's Consolidated Laws of New York annotated, Book 4, Banking Law. Section 606 of Article 13.

WHEN SUPERINTENDENT MAY TAKE POSSESSION OF BANKING ORGANIZATION; WHEN POSSESSION MAY BE SURRENDERED.

3. When the superintendent shall have duly taken possession of the property and business of any such banking organization, he may hold such possession until its affairs are finally liquidated by him, unless he shall surrender possession as provided in subdivision two of this section or in section six hundred thirty of this article, or be enjoined from continuing possession as provided in section six hundred seven of this article, or unless such banking organization shall, with the written approval of the superintendent, voluntarily wind up its affairs as provided in section six hundred five of this chapter.

Section 607 of Article 13—Manner and Time Within Which Taking Possession May Be Tested.

At any time within ten days after the superintendent has taken possession of the property and business of any banking organization such banking organization may apply to the supreme court in the judicial district in which its principal office is located, for an order requiring the superintendent to show cause why he should not be enjoined from continuing such possession. The court may, upon good cause shown, direct the superintendent to refrain from further proceedings and to surrender such possession. Formerly §60; amended L. 1932, c. 399, §2; renumbered 607 and amended L. 1938, c. 684, §104, eff. June 30, 1938.

Annotated Laws of Massachusetts—Vol. 5, c. 167, §33.

Application to Court to Enjoin Proceedings of Commissioner.

Whenever any bank of whose property and business the commissioner has taken possession deems itself aggrieved thereby, it may, at any time within ten days after such taking possession, apply to the supreme judicial court for the county w[redacted] the principal office of the bank is located to enjoin further proceedings; and said court, after citing the commissioner to show cause why further proceedings should be not enjoined, and after hearing the allegations and proofs of the parties and determining the facts, may, upon the merits, dismiss such application or may enjoin the commissioner from further proceedings and direct him to surrender the said business and property to the bank.

Deering's General Laws of California; 1937; Vol. 1; Act 986; Sec. 13.12. Court application by association aggrieved.

Whenever any association of whose property, business and assets the commissioner has taken possession, as aforesaid, deems itself aggrieved thereby, it may at any time within thirty days after such taking possession apply to the superior court of the county in which the principal office of such association is located, to enjoin further proceedings; and said court after citing the commissioner to show cause why further proceedings should not be be enjoined, and hearing the allegations and proofs of the parties and determining the facts, may upon the merits dismiss such application or enjoin the commissioner from further proceedings and direct him to surrender such business, property and assets to such association. APPEAL. An appeal from such judgment enjoining the commissioner from further proceedings and directing him to surrender such business, property and assets to such association shall not operate as a stay thereof, unless the trial court in its discretion shall so order and no bond need be given if such appeal be taken by the commissioner; but if such judgment dismisses such application an appeal therefrom shall not operate as a stay thereof but the court rendering such judgment may, in its discretion, enjoin the commissioner, pending the appeal, from further proceedings and direct him, pending the appeal, to surrender such business, property and assets to such association, provided a bond shall be given as required by section 943 of the Code of Civil Procedure.

Burns Indiana Statutes Annotated, 1933, Vol. 5. 18-301.

18-306. ACTION TO ENJOIN DEPARTMENT.

At any time within ten (10) days after the department shall have taken possession of the business and property of any financial institution, pursuant to the provisions of this act, unless such possession be taken under order and decree of court, pursuant to the provisions of section 42 (§18-302) of this act, such financial institution may, by petition, apply to the court wherein such liquidation proceedings are pending, for an order requiring the department to show cause why it should not be enjoined from continuing such possession, and, after notice to the department, and after hearing the evidence, the court may dismiss such petition or may order the department to refrain from further proceedings and surrender possession of such business and property.

Page's Ohio General Code Annotated, Vol. 1, Section 687.

Section 687-2 (Court may require superintendent to file bill of particulars, when; answer and cross petition; hearing; appeal from final order).

The domestic building and loan association named in the title of the proceedings provided for in section 687-1 of the General Code may within seven days after the filing of notice, pursuant to sub-paragraph 3 of said section, make application to such court for an order requiring the superintendent, within such time, not exceeding fifteen days, as may be fixed by the court, to file therein a bill of particulars specifying the ground or grounds named in section 687 of the General Code on which he has taken possession of its business and property and the operative facts found by him with respect thereto.

If the superintendent does not comply with such order within the time fixed therein such liquidation proceedings shall be dismissed. Within fifteen days after the filing of such bill of particulars, the association may file an answer and cross petition in such proceedings joining issue on the allegations set forth in the bill of particulars. If issue is so joined, the court, or a judgment thereof in vacation, shall set the proceedings down for immediate hearing upon such issue or issues. If the court finds that the bill of particulars is insufficient in law or that the superintendent of building and loan association has exceeded or abused his power and discretion, the court shall dismiss the liquidation proceedings and direct the superintendent to surrender its business and property to such building and loans (loan) association; and the decree and order of the court shall operate to revest the title of all such property in such building and loan association as of the time therein specified. An appeal may be taken from the final order of the court as in other chancery cases. An appeal by the superintendent of building and loan associations from a final order dismissing such proceedings shall operate as a supersedeas thereof. The perfecting of such an appeal by such superintendent shall be governed by section 12227 of the General Code.

New Jersey Statutes, Annotated, Title 17:

42-66. APPLICATION FOR INJUNCTION.

The commissioner may apply to the chancellor for an injunction restraining the association from transacting further business, or transferring or disposing of its property in any manner. The chancellor upon being satisfied of the sufficiency of the application, may order an in-

junction and appoint a receiver, with power to sue for, collect, receive and take into his possession all the real and personal property, rights and credits, moneys, books, paper, choses in action, bills and notes and property of every description of the association, and sell, convey and assign the same, and hold and dispose of the proceeds thereof under the direction of the court of chancery. The application may be, instead, for an injunction against excessive expenses of management, or for the removal of the attorney, conveyances or any officer, director, employee or agent of the association, or for such other relief or correction as the facts require. The chancellor, after hearing, may grant such orders and in his discretion, may modify or revoke the same, as the evidence, the situation of the parties and the interests involved require.

Kentucky Revised Statutes, 1946:

287.560. (165a-13; 165a-16.) DIVISION TO TAKE CHARGE OF INSOLVENT INSTITUTION; WARNING AGAINST UNSAFE POLICIES; APPOINTMENT OF RECEIVER.

(1) If it appears upon examination that any bank or trust company is insolvent or that its capital has become impaired, and has been permitted to remain impaired beyond the period allowed by law, the division of banking shall immediately take charge of the bank or trust company and all of its property and effects.

(2) If an examiner finds that any bank or trust company is pursuing a dangerous and unsafe policy, the examiner shall call the directors and officers of such institution together and advise them fully of the nature of such objectionable practices, and warn them against a repeti-

tion thereof, and shall make a full report to the division of banking of the practices warned against, and the advice given by him and thereupon the director of banking, shall, in person or by written notice to each director, require a cessation of such objectionable practices or policy. If his directions are not complied with, he may place an examiner in charge of such bank, or he may adopt such other policy as he deems best to bring the institution back to a safe condition.

(3) The officers, directors, or stockholders of any bank or trust company may execute to the director of banking a bond with security approved by him, to secure the creditors of such bank or trust company, and upon the execution of such bond the director of banking shall leave with or restore the custody and management of the bank or trust company to the officers and directors thereof. If the director of banking deems it necessary, he may cause a petition to be filed in the circuit court of the county where such bank or trust company is located, or apply to such court or to the judge thereof when the court is not in session, for the appointment of a receiver of such bank or trust company, and thereupon such court or the application for the appointment of a receiver, not later than twenty days from the date such motion is made. Notice of the hearing shall be served upon the bank or trust company. Upon such hearing the parties may be heard by affidavits or upon oral examination in court or before the judge and thereupon the judge shall hear and determine the question of the appointment of the receiver. If the court determines that such action or proposed action of the director of banking was justified, the court shall appoint a receiver, and shall fix the amount of the bond to be given by him.

In addition to the foregoing sections omitted by appellants in their Appendix "C" are the following extracts at random from a few other state statutory provisions also permitting immediate court hearing, which appellees contend is the essential element of due process.

Smith-Hurd Illinois Annotated Statutes—Chapter 32:243.

AUDITOR—DUTY—WHEN ASSETS ARE IMPAIRED—DISSOLUTION—RECEIVER.

When it shall appear to the Auditor of Public Accounts that the assets of any association doing business in this State are impaired to the extent that such assets do not exceed the dues paid on the shares with interest thereon at the rate of three per centum per annum for the average time invested or that it is conducting its business in a fraudulent, illegal or unsafe manner, he may direct the Attorney General to file a bill in the Circuit Court of the county in which said association is located in the name of the People of the State of Illinois against said association and its directors for the dissolution of said association and for an injunction and for the appointment of a receiver for the winding up of the affairs of said association and said court upon presentation of said bill and upon being made satisfied that the assets of said association have become impaired to such an extent that it can not be made good or that such association is being conducted in an illegal, fraudulent and unsafe manner, shall immediately appoint a competent and disinterested person as receiver of said association and shall determine and fix his bonds and prescribe his duties, and said cause shall proceed as other cases in equity.

And no bill shall be filed nor proceedings commenced in any court for the dissolution or for the winding up of the affairs or for the appointment of a receiver for such association on the grounds of insolvency or impairment of the assets of such association or on the grounds that such association is being conducted in an illegal, fraudulent or unsafe manner, except in the name and by the authority of the Auditor of Public Accounts represented by the Attorney General.

Such receiver shall file with the Auditor a copy of each report which he makes to the court appointing him in order that said Auditor may have at his command a complete record of all associations whose business has been so liquidated.

Wisconsin Statutes—1943:

215.33. POSSESSION BY BANKING COMMISSION. (1) CONDITIONS FOR TAKING POSSESSION.

The banking commission may forthwith take possession and control of the business and property of any association to which this chapter is applicable whenever it shall find that such association:

(a) Is conducting its business contrary to law, or

(b) Has violated its charter or any law, or

(c) Is conducting its business in an unauthorized or unsafe manner, or

(d) Is in an unsound or unsafe condition to transact its business, or

(e) Has an impairment of its capital, or

(f) Cannot with safety and expediency continue business, or

(g) Has suspended payment of its obligations, or

(h) Has neglected or refused to comply with the terms of a duly issued order of the commission, or

(i) Has refused to submit its books, papers, records or affairs for inspection to any examiner, or

(j) Has refused to be examined upon oath regarding its affairs.

(10) APPEAL. Whenever any such building and loan association whose property and business the banking commission has taken possession of, as aforesaid, deems itself aggrieved thereby, it may, at any time within ten days after such taking, apply to the circuit court of Dane county to enjoin further proceedings: and said court after citing the banking commission to show cause why further proceedings should not be enjoined and hearing all allegations and proofs of the parties and determining the facts, may, upon the merits dismiss such application or enjoin the banking commission from further proceedings, and direct it to surrender such business and property to such building and loan association.

Oregon Compiled Laws:

§41-901. POSSESSION AND OPERATION BY CORPORATION COMMISSIONER.

The directors of a savings and loan association may at any time call upon the corporation commissioner to take possession of and operate the properties and business of the association in the interests of its investors, creditors and shareholders and said corporation commissioner forthwith shall comply with such request by assigning the supervisor or bonded deputy from his department to such task.

Whenever the corporation commissioner shall take possession of any savings and loan association, whether by its request or in the exercise of his discretion and powers granted to him by the provisions of this act, he shall post in a conspicuous place in the principal office of such association a notice that he is so taking possession thereof and this shall operate as a bar to and as a dissolution of any attachment or other court proceeding then pending against said association.

If such possession of the property and business of an association has been taken by the corporation commissioner, without the request or written consent of its directors, said directors may, within ten (10) days after the posting of said notice, apply to the circuit court of the county in which the principal office of said association is located for an order requiring the corporation commissioner to appear and show cause why he should not be enjoined from continuing in such possession. Failure to file such application within ten (10) days shall be construed as a consent to such possession and be a bar to a later filing of such application. Said court may, after hearing and upon good cause shown, direct the corporation commissioner to refrain from continuing in such possession. Said corporation commissioner, however, shall in all such cases upon restoring possession to the directors of said association be allowed and paid from the funds of said association his reasonable expenses incurred during such possession including not to exceed $10 per business day, as compensation for the time the supervisor or bonded deputy has been in charge of said association. In the event no application is made to the court, as and within the time provided for herein to restrain said corporation commissioner, or if the court, after hearing had on such applica-

tion, shall deny the same, the corporation commissioner shall continue in possession and control of the properties and business of said association until said association, its properties and business, are sold, liquidated or restored to the directors by said corporation commissioner; and during such possession and control by the corporation commissioner no receiver for said association shall be appointed by any court, nor shall any instrument of assignment for the benefit of creditors of said association be filed in any court within this state, without notice to and consent of said corporation commissioner. (L. 1931, ch. 373, §52, p. 768; O. C. 1935 Supp., §25-393.)

Minnesota Statutes:

§49.04. Involuntary Liquidation of Financial Institutions.

Sub. 1. Commissioner taking possession; grounds for; rights of third parties.

When it shall appear to the commissioner that any financial institution has violated its charter, or any law of the state, or is conducting its business in an unsafe or unauthorized manner, or that its capital is impaired, or if it or any of its controlling officers shall refuse to submit its books, papers, and concerns to the inspection of the commissioner, or any assistant by him thereunto duly authorized, or if any of its officers shall refuse to be examined upon oath touching its concerns, or if it shall suspend payment of its obligations, or furnish reason for the commissioner concluding that it is in an unsound or unsafe condition to transact the business for which it was organized, or that it is unsafe and inexpedient for it to continue business, or if it shall neglect or refuse to observe a proper order of the commissioner, he may forth-

with take possession of its property and business and retain this possession until it shall resume business or its affairs be finally liquidated, as herein provided. On taking possession of the property and business of any such financial institution, the commissioner shall forthwith give notice of that fact to any and all financial institutions or other corporations, associations, partnerships, and individuals holding, or in possession of, and of its assets. No financial institution or other corporation, association, partnership, or individual knowing of such taking possession by the commissioner, or notified, as aforesaid, shall have a lien or charge for any payment, advance, or clearance thereafter made, or liability thereafter incurred against any of the assets of the financial institution of whose property and business the commissioner shall have taken possession, as aforesaid. The financial institution may, with the consent of the commissioner, resume business upon such conditions as may be approved by him. Upon taking possession of the property and business of the financial institution, the commissioner is authorized to collect moneys due to it and to do such other acts as are necessary to conserve its assets and business, and shall proceed to liquidate the affairs thereof, if in his opinion it cannot safely resume business, as hereinafter provided.

Sub. 2. Application to enjoin liquidation. Whenever any such financial institution of whose property and business the commissioner has taken possession as aforesaid deems itself aggrieved thereby it may at any time within ten days after such taking possession apply to the district court to enjoin further proceedings, and said court, after citing the commissioner to show cause why further proceedings should not be enjoined, and hearing the allega-

tions and proofs of the parties in determining the facts, may upon the merits dismiss such application or enjoin the commissioner from further proceedings and direct him to surrender such business and property to such financial institutions.

New Mexico Statutes:

§50-1416. INSOLVENCY—REPORT TO GOVERNOR—RECEIVER—DEPUTY EXAMINER—BOND AND COMPENSATION.

If at any time it shall appear to the bank examiner that any bank (building and loan association) is insolvent, it shall be his duty to report the fact to the governor, and if it appears to the governor that such proceeding is necessary, he shall at once direct the bank examiner to immediately take charge of such bank (building and loan association) and all of the property and effects thereof.

Upon taking charge of any bank (building and loan association), the bank examiner shall as soon as possible, ascertain by a thorough examination of its affairs, its actual condition, and make a full and complete return thereof to the governor, and if the governor shall become satisfied that such bank can not resume business or liquidate its indebtedness to the satisfaction of all of its creditors, the attorney-general shall, upon advice from the governor, institute proper proceedings in the proper courts for the purpose of having a receiver appointed to take charge of such bank and to wind up the affairs and business thereof for the benefit of its depositors, creditors and stockholders. The bank examiner may appoint, with the consent of the governor, a special deputy bank examiner to take charge of the affairs of an insolvent bank

(building and loan association) temporarily and until a receiver is appointed. Such special deputy bank examiner shall qualify by subscribing and filing with the bank examiner an oath, in form and substance the same as that required of said bank examiner, and giving a bond in such form and amount as may be required of him, and for his services he shall receive such compensation as may be fixed by the bank examiner, subject to approval by the court; said compensation to be allowed by the court as costs in the case of the appointment of a receiver: Provided, that in no case shall any bank continue in charge of such special deputy bank examiner for a longer period than ninety (90) days. (Laws 1909, ch. 96, §4; Code 1915, §462; C. S. 1929, §13-1003.)